No. 189.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

JOHN P. MALLETT AND C. B. MEHEGAN,
Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA,
Defendant in Error.

PORTIONS OF THE RECORD,

Printed in Compliance with Rule Six of the Supreme Court of the United States.

BYRON S. ADAMS, PRINTER AND BINDER, WASH., D. C.

No. 505.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

JOHN P. MALLETT AND C. B. MEHEGAN,
Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA,
Defendant in Error.

NORTH CAROLINA,
EDGECOMBE COUNTY.

Be it remembered, that at a session of the First Criminal Court for the county of Edgecombe, opening and held in the court-house at Tarboro, N. C., on the fourth Monday in September, 1898, it being the 26th day of September, 1898, present, his Honor Thomas H. Sutton, Judge presiding, and Walter E. Daniel, Solicitor, prosecuting on behalf of the State, the following proceedings were had in the cause therein pending, wherein the State was plaintiff and John P. Mallett and Charles B. Mehegan were defendants, to-wit:

The Minute Docket of said term, page 234, shows the following entry:

CONSPIRACY.

State
vs.
John P. Mallett and C. B. Mehegan.

The defendants came into court and, through their counsel, filed a plea in abatement to the bill of indictment

found at November Term, 1897. The facts are found by the Court to be as stated in said plea. The bill is dismissed by order of the Court.

The State then proceeded upon the bill of indictment found at February Term, 1898, which the defendants moved to quash. Motion overruled, and defendants excepted. The defendants then plead not guilty.

The plea referred to above is as follows:

NORTH CAROLINA—Edgecombe County.
Circuit Criminal Court, 1898.

State
vs.
J. P. Mallett, C. B. Mehegan and H. T. Latham.

The defendants J. P. Mallett and C. B. Mehegan say:

They ought not to be held to answer the bill of indictment against them in this cause, because they were examined in supplementary proceedings, by virtue of subsection 5, sec. 488 of The Code of North Carolina, touching all matters in said indictment alleged against them and made full answers concerning same. That said examination was made prior to the finding of the bill of indictment in this case, and the plaintiff and his attorney in said supplementary proceedings, who were present and in part conducted said examination, are marked as witnesses before the grand jury upon the finding of said bill by the grand jury, and defendants allege that upon their testimony said indictment was found against them.

JOS. J. MARTIN,
G. M. T. FOUNTAIN,
Attorneys for Defendants.

Filed September 27, 1898.

G. W. ROBBINS, Clerk.

CASE SETTLED ON APPEAL.

STATEMENT "A."

STATE OF NORTH CAROLINA—
County of Edgecombe.
Circuit Criminal Court—Special Term, Sept., 1898.

State
vs.
John P. Mallett, C. B. Mehegan and H. T. Latham,
Defendants.

This is a criminal action in which the defendants John P. Mallett and C. B. Mehegan were tried before his Honor Thomas H. Sutton, Judge, and a jury at the special term of the Circuit Criminal Court for the county of Edgecombe, held at the court-house in Tarboro on the fourth Monday in September, 1898. There were two bills of indictment, the one upon which the defendants were tried being as follows:

INDICTMENT.

STATE OF NORTH CAROLINA—
County of Edgecombe.
Circuit Criminal Court—February Term, 1898.

State
vs.
John P. Mallett, C. B. Mehegan and H. T. Latham,
Defendants.

The jurors for the State, upon their oath, present: That prior to the 25th day of July, 1895, there were three several civil actions pending in the Superior Court of Edgecombe, and they were under an order of reference to Thomas H. Battle, Esq., in two of which Julian M. Baker

and Ida M. Adams, as administrators of Margaret L. Woolard, deceased, were plaintiffs, and John P. Mallett and C. B. Mehegan, co-partners trading as Mallett & Mehegan, were defendants, and the other of one said actions, Julian M. Baker and Ida M. Adams, as administrators of said M. L. Woolard, deceased, and as administrators d. b. n., c. t. a., of Solomon Woolard, deceased, were plaintiffs, and the C. B. Mehegan was defendant, and in the midst of the hearing of said causes by the said referee, on the day above mentioned, a compromise was reached between the parties, whereby they agreed at the term next ensuing of said court judgment should be rendered against the said John P. Mallett and C. B. Mehegan for the aggregate amount of five thousand, nine hundred and fifty-two and 73-100 dollars ($5,952.73), with eight per cent interest from February 1, 1894, which judgment was accordingly rendered at the term of said court held on October 14, 1895, and the said defendants, John P. Mallett and C. B. Mehegan, and their clerk, H. T. Latham, late of the county of Edgecombe, on the 1st day of July, 1895, at and in the county aforesaid, with intent to hinder, delay and defraud the said creditors of their just and lawful actions and debts aforesaid, did unlawfully, wickedly, secretly, deceitfully and feloniously conspire together to cheat and defraud the said creditors of the indebtedness due to them as aforesaid, contrary to the form of the statute in such case and provided, and against the peace and dignity of the State.

February 14th, 1898.

W. E. DANIEL, Solicitor.

On the back of the said bill are the following entries:

State

vs.

John P. Mallett, C. B. Mehegan and H. T. Latham.

Indictment—Conspiracy.

Witnesses:

X Julian M. Baker.

X Henry A. Gilliam.

James Whitehurst.

X C. L. L. Cobb.

Those marked X sworn by the undersigned foreman and examined before the grand jury. A true bill.

W. T. BRASWELL,
Foreman Grand Jury.

Except as to the term specified in the foregoing bill and the date thereof, the other bill of indictment, dated November 1, 1897, and found at November Term, 1897, of said Criminal Circuit Court, is in the same words and figures and signed in the same way by W. E. Daniel, Solicitor.

On the back of the November bill appear the following entries:

State

vs.

John P. Mallett, C. B. Mehegan and H. T. Latham.

Indictment—Conspiracy.

Witnesses:

Dr. Julian M. Baker. X

Henry A. Gilliam. X

James J. Whitehurst. X

C. L. L. Cobb. X

Those marked X sworn by the undersigned foreman and examined before the grand jury, and this bill found a true bill.

J. M. HOWELL,
Foreman of the Grand Jury.

———

In apt time, before the jury were empanelled, the defendants moved—

1st. To quash the bill of November Term, 1897, on the ground that one of the grand jury who passed on the same had not at that time paid his taxes in full.

Motion allowed.

2d. To quash the bill of February Term, 1898, on the same ground.

The name of D. D. Shelton, one of the grand jurors, is not found in the list of taxes for September, 1897, to September, 1898. Nothing was proved to show that said grand juror had not paid his taxes for the preceding year, that is, the taxes due for September, 1896, to September,

1897. The motion to quash this bill is overruled, and the defendants except.

Again, in apt time, before the jury were empanelled, the defendants moved to quash the bill of February Term, 1898, putting their motion in writing, as follows:

NORTH CAROLINA—Edgecombe County.
Circuit Criminal Court, 1898.

State
vs.
John P. Mallett, C. B. Mehegan and H. T. Latham.

The defendants John P. Mallett and C. B. Mehegan, say: They ought not to be held to answer the bill of indictment against them in this cause, because they were examined in supplementary proceedings by virtue of subsection 5, section 488 of The Code of North Carolina, touching all matters in said indictment alleged against them, and made full answers concerning same.

That said examination was made prior to the finding of the bill of indictment in this case, and the plaintiff and his attorney in said supplementary proceedings, who were present and in part conducted said examination, are marked as the witnesses before the grand jury upon the finding of said bill before the grand jury, and the defendants allege that upon their testimony said indictment was found against them.

JOS. J. MARTIN,
G. M. T. FOUNTAIN,
Attorneys.

Defendants offered testimony to show that H. A. Gilliam, who was attorney for Dr. Julian M. Baker, and the latter were before the Clerk at the time these defendants

were examined in supplementary proceedings, that these same persons (Gilliam and Baker) went before the grand jury when this bill was found and were examined; that the names of Dr. Baker and Mr. Gilliam both appear as witnesses for the State on the bill of indictment. This testimony was admitted and not disputed by the State.

Mr. Ed. Pennington was sworn as a witness for the defendants, and testified as follows:

I was Superior Court Clerk in July, 1895, and subsequent to that time, and am now The defendants in this case were examined before me in supplementary proceedings. (This witness is offered, so the defendants state, to show that the testimony of the defendants before him in supplementary proceedings was the same as that charged in the bill of indictment.) The witness said that he did not recollect what they testified, except what appeared in his notes.

Counsel for defendants then proposed to ask the witness if the defendants testified to the shipping of certain goods. The State objected, because the proposed evidence was not germane; that shipping goods by defendant is not charged in the bill of indictment. Counsel for the defendants had expressly stated that this witness was tendered only to show that the testimony before him was the same as that charged in the bill of indictment, and that no evidence was set out in the bill of indictment.

The Judge stated then and several times afterwards during the trial, that it was not allowable for the State to introduce in evidence any statement made by either of the defendants on the examination in supplementary proceedings, nor was it admissible for any witness for the State to testify to any fact, knowledge of which was acquired by or through the disclosures made by the defendants on said examination; that such evidence was inadmissible before the grand jury and before the petit jury.

The defendants then introduced the typewritten copy

of the evidence taken before the Clerk in the supplementary proceedings. They offered no further evidence on the said motion to quash, and the same was overruled, and the defendants excepted. The jury was then sworn and empanelled and the trial proceeded.

(a). The State introduced evidence tending to show that Solomon Woolard, a wealthy merchant of Tarboro, N. C., died in 1889, leaving a last will and testament; that his widow, Margaret L. Woolard, qualified as his executrix, and that the defendant C. B. Mehegan who had been the principal buyer and confidential clerk of the testator, continued to manage the property as general agent of the widow and executrix.

(b). That the defendants, John P. Mallett and C. B. Mehegan, were brothers-in-law and engaged in the mercantile business in Tarboro under the firm name of Mallett & Mehegan, from January, 1890, to October or November, 1895, and the other defendant, H. T. Latham, the nephew of Mallett, was their clerk.

(c). That on January 25, 1890, the said Mallett & Mehegan executed their note to the said Margaret L. Woolard, executrix, for $6,636.39, with 8 per cent interest from date, due January 1, 1891, and at the same time a contract was executed by them and her (said note being given for the stock of goods $3,636.39, and borrowed money $3,000.00), that they would rent a certain store belonging to the estate for $400.00 for the year 1890, and that said debt of $6,636.39, and said renting, should be renewed for three years on the first of January each year, provided that the rent after the first year should be raised to $500.00 a year, and provided further, that it should be made to appear, on general exhibit, at the time of renewal, that the business of said firm was in a sound condition.

(d). That said Margaret L. Woolard died, intestate, September 30, 1893, and Julian M. Baker and Ida M. Adams

qualified as her administrators, and also as administrators d. b. n., c. t. a., of said Solomon Woolard.

(e). That shortly thereafter the said Julian M. Baker, one of the administrators, demanded of the said Mallett & Mehegan a statement showing the condition of their business, and they did make out a statement headed "General Statement of Mallett & Mehegan" on or about January 1, 1894, and sworn to by both of them before a justice of the peace, which represented that they were worth $17,000.00 over and above all liabilities; that they had cash on hand, $4,400.00; that they owed only $2,000.00 exclusive of what might be due from them to the Woolard estate; and, in effect, that their business was in a sound, healthy condition. The said Baker and his attorney, H. A. Gilliam, told said Mallett & Mehegan that they wishd this statement examined and verified by an expert accountant, but Mallett & Mehegan would not consent for this to be done. (Said Gilliam and Baker, when testifying in regard to said statement and other matters, were charged by the Court not to testify to any facts of which they acquired information at the examination in the supplementary proceedings or in consequence of such examination; they stated that they would not, and, as a matter of fact, they did not.)

(f). That in the interval between January 1, 1894, and March 1, 1894, said Mehegan had two conversations with Jno. F. Shackelford, in the first of which Mehegan said that his firm could pay in fifteen minutes what they owed the Woolard estate, but in the last conversation he said that Mallett would not agree for him to do it.

(g). The rent and note being unpaid, the administrators instituted suits for the same March 4, 1894, the three civil actions mentioned in the bill of indictment.

(h). That after the institution of said suits, the said Baker had a conference with said Mallett & Mehegan, at

their instance, in the law office of Messrs. Gilliam & Gilliam, with a view to having a settlement; Mallett & Mehegan had a store account against said Margaret L. Woolard, on which they insisted on the right to calculate interest every thirty days, to which Baker assented, and then it was only a matter of arithmetical calculation to fix the exact balance against Mallett & Mehegan. They agreed to settle, but though Baker frequently urged them to settle, they would not do it. It was not till after that conference that Mehegan set up a claim of $800.00 a year for four years for services rendered to the Woolard estate. He subsequently admitted to said Baker that, at said conference, he was not acting in good faith, and that he and Mallett had decided not to pay the debt, and to force the administrators to sue and get what they could.

(i). That C. B. Mehegan lived with his sister, S. Mallett, and her husband, the said John P. Mallett, and a long account in the ledger of Mallett & Mehegan for family supplies, etc., simply headed "home account," had been changed so as to make it appear to be an account against Mrs. John P. Mallett, and this account was credited in July, 1895, with large amounts as follows:

By board of C. B. Mehegan to July 1, 1894,		$1,237.50
By board of clerk, H. T. Latham, to July 1, 1894,		1,218.75
		$2,456.25
By account of John P. Mallett and family ("and family" erased in the ledger) to July 1, 1895,		$3,300.00
And on September 2, 1895, by board J. P. Mallett for July, August and September,		150.00
By board for Mehegan and Mallett for July and August,		75.00
And for September,		37.50
By board for Mallett for September,		50.00
		6,068.75

The ledger shows cash paid by Mallett & Mehegan to Mrs. John P. Mallett on July 19, 1895, $873.04; that the heading of this account in the ledger had on many of the pages been altered.

(j). That on May 18, 1895, the said S. Mallett had in her possession a large roll of money; that on that day she bought ten shares of stock in the Bank of Tarboro, paying on the same $400.00, 40 per cent of the value, and using for that purpose only about one-third of said roll of money.

(k). That the three civil actions were referred to Thos. H. Battle, Esq., and were being heard by said referee in Tarboro, on July 25, 1895; that the said Mehegan was a voluntary witness for the defendants in said suit; that he was examined in regard to said statement of January 1, 1894, and said that it had been carefully prepared and was in all respects correct; that they had counted the cash, $4,400.00; that his firm's business was in a healthy condition, and that they were abundantly able to pay what they owed the Woolard estate, even if they were not allowed the counter-claim set up in said action, the $800.00 a year for four years for services, etc.

(l). That in the midst of the hearing before said referee, on July 25, 1895, a compromise was reached between the parties, reduced to writing as follows:

"It is consented and agreed by all the parties hereto that the three above-entitled cases (those mentioned in the bill of indictment) be consolidated into one case, and that the rights and liabilities of the parties, as determined in the one case, shall determine their rights and liabilities in all of them. It is further consented and agreed that the pleas of the defendants be withdrawn and that all the testimony introduced be stricken out. It is further consented and agreed that the referee report to the Court that the defendants are indebted to the plaintiffs in the sum of five thousand nine hundred and fifty-two dollars and seventy-

three cents ($5,952.73), with 8 per cent interest from the first day of February, 1894." The amount claimed by the administrators was about $11,000.00, but they accepted the compromise on the defendants' assurance that they would pay the amount agreed on without further trouble.

(m). That it was subsequently ascertained from the day-book of Mallett & Mehegan that they made the following shipment of goods on so-called verbal orders to fictitious persons, at the dates given below:

E. T. Roberson, Robersonville, Oct. 4, 1895, -	$189.09
T. H. Parker, Rocky Mount, Oct. 5, 1895, - -	148.77
S. W. Bell, Kelford, Oct. 7, 1895, - - -	168.51
M. H. Owens, Williamston, Oct. 9, 1895, - -	129.56
	635.93

That these goods were shipped to the above-named parties, who had no real existence (as was first learned by the prosecutor, Julian M. Baker, in January, 1896), marked "O. N.," that is, "Order, notify," the parties to be notified, the bills of lading being kept by Mallett & Mehegan; that the goods were to be delivered by the railroad company on receiving bill of lading; that the goods were packed, marked and shipped by C. B. Mehegan; that in the examination before S. S. Nash, Esq., Referee, in September, 1897, John P. Mallett said he did not have any "accurate knowledge" of these shipments, explaining that by "accurate knowledge" he meant "assisting in packing, marking and shipping the goods; that said Mallett kept the firm ledger, to which the other entries in the day-book were transferred, but not those above specified; that soon after the arrival of the goods in Rocky Mount, Latham called for them but was told by the railroad agent there that he could not get them without surrendered bill of lading. That soon after John P. Mallett went to Rocky

Mount and asked the railroad agent there how to get the goods shipped to T. H. Parker; that said goods were afterwards, to-wit, on October 18, 1895, shipped by the railroad company from Rocky Mount, in the name of H. T. Latham as consignor, to Blount Bros., Bethel; that in the examination before Mr. Nash, John P. Mallett said he did not have any knowledge of said shipments to fictitious persons, but only observation; that he stayed there in the store of Mallett & Mehegan and took an active part in conducting the business; that C. B. Mehegan went to Robersonville and Williamston and sent H. T. Latham to Kelford for the goods shipped to those respective places; that in the examination before Mr. Nash, Mehegan said that he told Mallett to go to Rocky Mount, and he presumed he did; that they sold the goods at the points to which they were shipped and pocketed the money and spent it, paying none of it to the prosecutors on their said indebtedness; that H. T. Latham went to Kelford on October 16, 1895, and registered at the hotel there first as H. T. Thomas (afterwards changing the Thomas to Latham on seeing near him a certain man who had introduced him, Latham, to the hotel keeper at the depot); that Latham offered for sale in Kelford the goods shipped to S. W. Bell.

(n). That at the term of the Superior Court of Edgecombe County held October 14, 1895, the next Court after July 25, 1895, judgment was rendered in accordance with the compromise of the date hereinbefore mentioned, and on said judgment at least $4,500.00 is still due.

(o). That at the time said compromise agreement was entered into, and as an inducement moving the plaintiffs in said action to accept the same, the said Mallett & Mehegan represented to the said plaintiffs their entire ability to meet and fully perform the same, and repeatedly gave assurance of their sincerity, good faith and purpose to carry out the same in all respects according to the terms

thereof. That the said plaintiffs thereafter fully relied upon the compromise agreement and the assurances of the said Mallett & Mehegan as to their financial ability and honest purpose to fully meet and comply with the terms thereof, and so continued to repose confidence in the same until late in the afternoon of Thursday preceding the convening of the Superior Court on Monday, October 14, 1895, when they received from them the following communication, to-wit:

Tarboro, N. C., Oct. 10, 1895.

Dr. J. M. Baker,
Miss Ida M. Adams,
Administrators of M. L. Woolard.

Dear Sir and Miss:—In settlement of your claim against us we respectfully submit the following proposition, viz:

1st. The report of the referee shall be four thousand ($4,000.00) instead of five thousand nine hundred and fifty-two and 73-100 dollars ($5,952.73). To pay the amount (four thousand dollars) we will deliver into the hands of the Clerk of the Court, or cause to be delivered into his hands, on the day the report of the referee is affirmed and docketed, the following bonds and mortgages which we will assign to you, viz:

Note against O. Burnet and accrued interest to October 15, 1895, - - - - - - -	$39.49
Note against M. H. Pippen and accrued interest to October 15, 1895, - - - - - -	283.79
Mortgage against B. F. Havens and accrued interest to October 15, 1895, - - - - -	50.00
Five notes against J. A. Warren, secured by deed of trust, - - - - - - - - - -	696.83
We deduct $10.00 of accrued interest on above to equalize 6 per cent with 8 per cent interest.	
Amount forward ----------	1,070.11

Amount forward	1,070.11
Mortgage against W. T. Gray and others, with accrued interest to October 15, 1895,	260.00
	1,330.11
Deed in trust for your benefit by J. P. Mallett and wife on J. P. Mallett's property, worth	800.00
Cash,	2,412.39
	4,542.50

The debts and cash offered will amount to four thousand five hundred and forty-two and 50-100 dollars, which, when delivered to the Clerk of the Court, shall be in full satisfaction of your claim, principal, interest and court costs.

2d. The release and discharge of C. B. Mehegan as agent and attorney for M. L. Woolard, executrix, and M. L. Woolard individually, as agreed, to be executed and delivered to C. B. Mehegan when settlement, as hereinbefore named, is made with the Clerk of the Court.

3d. The report of the referee is to be recorded in full when $4,000.00 is substituted for $5,952.73.

We desire that the release and discharge to be executed by you to C. B. Mehegan shall set forth the period of time which he occupied such position, the amount of receipts and disbursements as a whole which he made (as per statement of Mr. Gaskill) and the books and papers were examined by an expert accountant and found to be correct.

As we have the assurance that we can borrow the money if accepted, we make it in good faith and request that you let us hear from you at your earliest convenience, and oblige,

Yours very truly,

MALLETT & MEHEGAN.

(p). That immediately upon the receipt of the communication set forth in the preceding paragraph hereof, the said Baker and Adams, Administrators, made affidavit in said action, among other things alleging as follows:

"That since the 25th day of July, 1895, and more particularly of late, the defendants have permitted their stock to run down and to become greatly depleted, that they have sold and are selling their stock of standard groceries below the market price, that they are rapidly selling and disposing of their stock at a sacrifice and converting the same into cash with the view and purpose of secreting and withdrawing the same from the reach of the plaintiffs (Baker and Adams); that affiant is informed and believes that the defendants (Mallett and Mehegan) have in possession a large sum of money from the sales of their said stock, notwithstanding their pretense and representation contained in their communication of this date that they would be obliged to borrow the amount named therein; that the defendants (Mallett and Mehegan) have heretofore carried a large stock and bought of northern merchants in large quantities, but of late have only bought in small quantities from local jobbers. The affiant is informed and believes that the defendants are largely indebted, if not insolvent, and that, for the reason and circumstances above related, the defendants have withdrawn and secreted large sums of money for the purpose of defrauding the plaintiffs of the said indebtedness, and that it is their purpose and intent to assign, dispose of and secrete their property with intent to defraud the plaintiffs and their creditors and to hinder, delay and defraud them in the enforcement and collection of their debts."

That upon the aforesaid affidavit the Clerk of the Superior Court of Edgecombe County, on the 10th day of October, 1895, issued a warrant of attachment to the sheriff of said county, commanding him to levy the same upon and

seize all the property of the said Mallett & Mehegan to be found in his county; that no answer having been filed in said proceedings by the said Mallett & Mehegan, and no motion made to dismiss said warrant of attachment, judgment was accordingly rendered at Fall Term, 1895, of said court, continuing said attachment and condemning the property levied upon and seized by the sheriff thereunder for the payment of the said indebtedness to Baker and Adams, Administrators.

(q). That in January, 1898, the defendant Mehegan had a large amount of money in his possession, a big roll of what he said were $20.00 bills in one pocket; he said he had twice as much in another pocket, and three times as much coming to him by express that day.

3. The State's witnesses, H. A. Gilliam and Julian M. Baker, testified as set forth in articles (e) and (k), ante, in regard to the statement of January 1, 1894, by the defendants as to the financial condition of the firm, the said witnesses testifying to statements made by C. B. Mehegan in the examination before Thos. H. Battle, Esq., Referee, on July 25, 1895. The defendants duly objected, because the said statement of January 1, 1894, had been used as the basis of the examination of said Mehegan subsequently, to-wit, in January, 1896, in the supplementary proceedings before the Clerk. The witnesses of the State were cautioned by his Honor, and did not testify to any statement made by said defendant in the supplementary proceedings, nor to any fact of which they had acquired knowledge by reason of said examination. The objection was overruled and the defendants excepted.

4. Julian M. Baker testified that he had made diligent search for said statement of January 1, 1894, among his papers in his office, among the papers in his attorney's office; that he had searched for it among the papers of the estate; that he had not been able to find it; that the last

time he saw it was at the hearing before the referee, Mr. Thos H. Battle, when the said Mehegan was a voluntary witness in behalf of the defendants. The State was allowed to prove the contents of the statement. The defendants object, because they were examined before the Clerk in the supplementary proceedings. Objection overruled, and the defendants excepted.

5. Dr. Julian M. Baker testified that he assented to the calculation of interest every thirty days on the store account of Mallett & Mehegan against the intestate, M. L. Woolard, as stated in article (h), ante. The defendants objected to that testimony. Objection overruled. Defendants excepted.

6. After testifying to the conference in Gilliam & Gilliam's office, as stated in article (h), the witness, Dr. Baker, testified that the defendant Mallett refused to talk to him about the claim. The defendants object to all this testimony. Objection overruled. Exception by the defendants.

7. The personal property exemptions of each of the defendants now on trial were allotted to them under the warrant of attachment mentioned in article (p), ante. They filed exceptions to nearly every one of the articles assigned, insisting that there was an over-valuation in nearly every case. The two appeals were referred from the Superior Court to S. S. Nash, Esq., who heard the same in September, 1897. At that hearing both of the defendants were voluntary witnesses in their own behalf, as they were in the trial in July, 1895, before the referee, Mr. Thos. H. Battle, and on neither of these occasions did either of the defendants seek to avail himself of his privilege not to answer any question, as the answer might tend to incriminate him.

In regard to the day-book or counter-book, mentioned in article (m), ante, (which book was found by the sheriff

in the defendants' own safe when he levied the attachment), the witness, Dr. Julian M. Baker, stated that the first time he heard this book referred to was at the examination in supplementary proceedings. The witness was then asked by the State whether or not he had heard said book referred to by Mallett & Mehegan at the examination before Mr. Nash, when the defendants offered themselves as witnesses in their own behalf voluntarily. The defendants object, because the testimony now offered is subsequent to the examination in the supplementary proceedings. Objection overruled, and the defendants except.

8. The witness, Dr. Baker, then proceeded:

"This book (the said book) is the day-book of Mallett & Mehegan. At the examination before Mr. Nash, Mallett said it was a counter-book; that the entries in it were transferred to the ledger. The entries are in Mehegan's handwriting, viz: 'E. T. Roberson, Robersonville, verbal order, October 4, 1895,' etc." See article (m), ante. The defendants ask that an exception be again put down, and the Court remarked that this objection was already stated more than once, and was ample to protect defendants, and that it was not necessary to enter another objection. To this the defendants except.

9. After reading out the verbal orders specified in article (m), ante, and stating that the entries in said book are in the handwriting of Mehegan, the witness stated: "I know of my own personal knowledge that there is no such person as S. W. Bell at Kelford, N. C." The defendants object, and allege that the statements made by them before Nash, Referee, were not voluntary, because, while they did offer themselves as witnesses in their own behalf, yet, upon cross-examination, when these matters were gone into, and this information elicited, they were not voluntary witnesses. (It does not appear that either of them ever

claimed the constitutional privilege to remain silent.) Objection overruled. Defendants except.

10. The same witness was shown the ledger of Mallett & Mehegan. One of the defendants was examined about this book in the supplementary proceedings. On that, the defendants object to the contents of the book being now proven. The State claims and says that the information now asked for was obtained by the witness before the supplementary proceedings were instituted, and that they propose to ask as to that only, and not as to any information obtained in the supplementary proceedings. The objection overruled. Defendants except. The witness then testified as indicated in article (i), ante.

11. On cross-examination this witness, Dr. Baker, was asked these questions by the defendants:

Q. Did you go before the grand jury when this bill was found, and did Mr. H. A. Gilliam go with you? A. We both went before the grand jury at different times.

Q. Did you carry with you before the grand jury, when you testified there on this bill of indictment, the evidence taken in the supplementary proceedings?

Counsel for the State objects to this question, and insists that the defendants' charge that the bill of indictment was found on illegal evidence had already been disposed of by the Court. [See exception (2), ante, that a motion to quash or a plea in abatement on such ground must be made on the arraignment before pleading, and after that would only be allowed at the discretion of the Court.]

The State further showed that all the testimony offered at the trial, based upon information or evidence, oral or writings, obtained upon the examination in the supplementary proceedings, had been excluded by the Court. Objection sustained. Defendants except.

12. C. L. L. Cobb, a witness for the State, testified as follows:

"I have been living at Kelford, N. C., six years last December. I am in the hotel and livery business. I was living in Kelford in October, 1895. I was at the depot October 16, 1895, on arrival of a certain train. Two men alighted from the train. One was a Mr. Hayden, whom I knew; he introduced the other to me as 'H. T. Latham.' I met them at the depot, morning train. There were goods there in the depot marked to 'S. W. Bell.' "

The defendants object to that part of the witness' testimony relating to having met a man introduced to him as H. T. Latham. Objection overruled. Defendants except.

13. The witness Cobb then exhibited a book, his hotel register. "The person who was introduced to me as H. T. Latham came to the hotel and first registered as H T. Thomas. He turned off from the book. Hayden was near by, coming up to the register. Then Latham wrote the word 'Latham' over the word 'Thomas.' Both words written there October 16, 1895. (The book is shown to the jury.) Latham offered the goods sent to S. W. Bell for sale. He offered to sell me these goods, and said he was going to try to sell them."

The defendants objected to this evidence because the matter was examined into in the supplementary proceedings, after the witness saw Latham at Kelford, and also because H. T. Latham is not on trial. The State insisted that apart from these grounds there were prima facie grounds for believing in the existence of the conspiracy, and that therefore the acts and declarations of Latham in execution or futherance of the scheme to defraud were admissible in evidence against the two defendants who were on trial. Furthermore, Mehegan, in his testimony before Nash, Referee, stated that he had sent Latham to Kelford. Objection overruled. Exception by defendants.

14. The testimony of the witness, E. Miller, was as follows:

"I know the defendants. Mehegan, in 1897, showed me five $5.00 gold pieces, and after that he showed me many kinds of money."

The defendants object. Objection overruled. The defendants except.

The witness proceeded: "And in January, 1898, he said he had a whole lot of money 'now in my pocket,' and took it out and showed me a large roll, and asked me how much I thought it was. I said it (the roll) might be $1.00 bills. He said 'no, they were $20.00 bills.' He said he had twice as much in another pocket, and three times as much 'coming by express to-day.' He said, 'Some people say I have no money, but that is my business. No one else knows, and it is no [one] else's business.' After this, when I had been summoned as a witness, he asked me what I was going to say. I told him I should only tell what I knew. He said people talk too much. He called me in a room and said this."

CROSS-EXAMINATION:

"I came from Russia. I have been here three years, going on four. I went into business here. I borrowed money through Mehegan. Mehegan said the gold money belonged to his aunt. My wife is in business on her own account. This money (the big roll) was shown to me about the time his brother, J. G. Mehegan, started the Citizens' Bank here. He said a lot of people said he had money, but it wasn't true. He told me if I was summoned as a witness to tell all I knew. This money was shown to me just before his brother started the bank."

15. At this stage of the trial four witnesses were tendered by the defendants to show what was testified to before the grand jury. The State objected to their being examined, on the grounds set forth in paragraph (11), ante. Objection sustained. Defendants excepted.

16. The testimony of the witness, John L. Shackelford, was as follows: "I know the defendants, Mallett & Mehegan, and recollect the time the suits were brought against them. Before the suits were brought, Mehegan asked me for advice. He said that Dr. Baker had qualified as administrator, and that he was afraid he was going to push them." (The suits were instituted, it is admitted, on March 4, 1894.)

The defendants object to what the witness had testified. Objection overruled. The defendants except.

Witness proceeded: "I told Mehegan to settle the matter up if it took all he had. I asked him the amount of the indebtedness, and he told me, but I do not now recollect it. He said that he could settle it in fifteen minutes; that he had money in his safe. Mallett & Mehegan conducted the business from that time till the time of the attachment. Since then they have not done any business. Some time after this I met Mehegan. The suits had been begun. I asked him why he did not settle. He said that Mallett would not agree to it."

17. "On May 17, 1895," continued this same witness, "I saw Mrs. John P. Mallett. She had money that date, and paid me $400.00 for ten shares of stock in the Bank of Tarboro; that is, she paid me 40 per cent on the par value of said stock. She had a large roll of money besides the amount she paid me."

Objected to by the defendants. Objection overruled and exception. [In the attachment affidavit mentioned in article (p), ante, served on Mallett & Mehegan, and not answered by them, it was alleged that on May 8, 1895, the said John P. Mallett, then greatly embarrassed financially, and not retaining property sufficient for the payment of his indebtedness, turned over to his wife, S. Mallett, $400.00, which she invested in the purchase of ten shares of stock in the Bank of Tarboro.] There was some further

testimony by the witness Shackleford but it was not objected to by the defendants.

18. The witness, H. A. Gilliam, was warned or cautioned by the Court not to testify to any statement by the defendants, or either of them, made on the examination in the supplementary proceedings. He testified as follows: "I am one of the attorneys representing the administrators of the Woolard estate. In accordance with the contract between them and Mrs. Woolard [see article (c), ante], Dr. Baker and I demanded of Mallett & Mehegan a statement of the affairs of the firm. We told them that we would not accept a statement made by them alone; it must be made out by an expert accountant and verified. Subsequently a statement was filed by them in the Clerk's office, dated January 1, 1894, sworn to by them before a justice of the peace. This is the same paper testified to by Dr. Baker as having been lost. Both Dr. Baker and I have looked for it in my office and in the Clerk's office It can not be found. This paper was before Mr. Thos. H. Battle, Referee, on July 25, 1895, and was being inquired into. Mehegan was examined in respect to it. He was examined as to the condition of the affairs of Mallett & Mehegan, at the time of making the statement and at the time of the examination."

Defendants object. Objection overruled. Exception.

"Mehegan said that the statement made out and filed was true; that it had been carefully verified by him, Mallett, and Latham, their clerk; that the money mentioned in the statement had been counted. He said this on the examination before Mr. Battle, Referee. This paper (shown to witness) represents the substance of said Mehegan's evidence before said referee. Mehegan was examined as to each item of the statement and said it was taken with care. He was asked as to the condition of Mallett & Mehegan at that time, July 25, 1895. He said that they could

pay the Woolard estate all that they owed it. The amount due from them to that estate was about eleven thousand dollars. After that attachment had been levied [as stated in article (p), ante], we asked for the combination of the safe and the cost mark of the goods, but they refused to give us either. Upon the advice of their counsel they refused."

Defendants object. Objection overruled. Exception.

19. The witness: "After the warrant of attachment was issued and the defendants' store closed, Mallet & Mehegan began to collect money due them. I know they collected some. There was about two hundred or two hundred and fifty dollars in money (some) of it marked as due to other persons, found in the safe." (An exhibit of what was found in the safe is produced.)

The defendants then called for the written evidence taken before S. S. Nash, Referee. The evidence was accordingly produced, and the defendants object. The evidence originally taken before the [referee] Nash was admitted, and the defendants except.

"Mehegan, on that examination, said that he had made collections after the attachments were levied and put the money in his pocket. Both Mallett & Mehegan, voluntary witnesses in their own behalf before Nash, Referee, were on cross-examination asked about the shipments to Roberson, Parker, Bell and Owens, and said that they were fictitious persons, and that they, Mallett & Mehegan, had reclaimed the goods, and sold them and put the money in their pockets He said that these shipments were made in October, 1895. Mallett said that he had no knowledge of the sales; said he had no 'accurate knowledge.' He said that he meant that he did not pack or mark the goods; that he saw Mehegan shipping them and made no remark; that he (some time between the date of the levy, October 11, 1895, and the date of the examination in the

supplementary proceedings), went to Rocky Mount and reclaimed the goods shipped to T. H. Parker."

The State offered to show that this witness was present at the sheriff's sale under the attachment, and that defendants bought goods there.

Defendants object. Objection overruled. Defendants except.

"The sale was in November, 1895; Mehegan bought some of the goods; said the goods were bought for H. T. Latham; they were put in the store occupied by S. Mallett, wife of the defendant John P. Mallett. Mallett & Mehegan continued to occupy the same store where the goods were attached, and where a business was (thereafter) carried on in the name of S. Mallett "

Cross-examination.—"As one of the attorneys of the said administrators, I was present and representing them both on the examination in the supplementary proceedings in December, 1895, and January, 1896, and before the referee, Mr. S. S. Nash, in September, 1897. In the latter examination, Mallett was asked if he hadn't stated so and so in the examination before the Clerk in the supplementary proceedings." (Herein the counsel for the defendants used the written evidence taken before Nash, Referee, and from that evidence asked the witness what the defendants had said about collecting debts after the attachment had been levied.)

The witness proceeded: "Mehegan said he did collect debts due the firm and put the money in his pocket and had a right to do so. He said he did not consult with Mallett as to the shipment of the goods (to the fictitious persons). Mallett says he saw them packed. The debts were not garnisheed when they were collected by Mehegan, but the attachment was out and levied upon all their goods, accounts, etc.; Mehegan said he used part of the money to pay old debts of Mallett & Mehegan; that he

collected money before and after the allotment of the personal property exemptions."

20. Defendants' counsel asked the witness, H. A. Gilliam, if the affidavit of O. Williams, Jr. (who was agent of the sheriff and made the sale under the attachment proceedings), did not show that Latham bought the goods that were carried to Mrs. S. Mallett's store as previously stated.

The State objected to this as hearsay evidence. Objection sustained. Defendants excepted.

(They afterwards said that they did not offer the O. Williams, Jr., paper as evidence.)

21. The State offered the written or documentary evidence taken before Thos. H. Battle, Referee, prior to the examination in supplementary proceedings. The defendants objected for that (1) the document offered was not the original, and (2) it was not a full copy of the evidence. It appeared that this was one of the carbon copies made by the stenographer from his notes at the same time that he made the original, and that the report of the evidence so copied was complete so far as it related to the matter now in controversy; that it was not completed because a compromise between the parties was reached and further litigation then suspended. The Court admitted the paper for the purpose of refreshing the witness' recollection and not as independent or substantive testimony. The defendants excepted. In this examination before Battle, Referee, Mallett & Mehegan testified voluntarily as witnesses in their own behalf.

The witness, H. A. Gilliam, proceeded: "In this examination before Battle, Referee, Mehegan stated that they, Mallett & Mehegan, were able to pay what they owed the Woolard estate, even if they were not allowed the counterclaims set up by them."

22. The first bill of indictment hereinbefore mentioned,

the one found at November Term, 1897, was introduced in evidence by the State.

The defendants objected. Objection overruled. Exception.

23. The State closed. The defendants being called on to introduce evidence if they desired to do so, their counsel stated that they desired to see the note mentioned in article (c), ante, which they had notified counsel for the State to produce. The note had been filed with the Clerk when the judgment was rendered as stated in article (c), ante. Several efforts were made to find the note, in vain, and it not being filed, the Court desired the defendants to proceed to introduce witnesses or to argue the case. The defendants' counsel declined to introduce testimony because the note was not present, and the Court directed counsel to proceed. Defendants except.

A copy of the note, admitted to be a copy, was here tendered to the defendants' counsel, and they had it in their possession before the argument began, and they still refused to introduce testimony.

The defendants had the opening and conclusion of the argument before the jury.

24. After three of the counsel had spoken to the jury, the defendants filed the following paper:

NORTH CAROLINA—Edgecombe County.

Circuit Criminal Court, Special Term, Sept. 26, 1898.

State
against
J. P. Mallett and C. B. Mehegan.

The defendants put the evidence taken in supplementary proceedings in evidence before his Honor, Judge presiding, upon their preliminary plea, in which they state "That every fact alleged in the indictment in this case, the de

fendants were each fully examined about in said supplementary proceedings," and especially called the Court's attention to page 3 of the evidence taken in supplementary proceedings, in which the object of said examination is stated by plaintiffs' counsel to be "To show the defendants went to work in a systematic way for purpose to cheat J. M. Baker and Ida M. Adams, administrators of M. L. Woolard, etc , and to fraudulently dispose of their property to prevent the recovery of their judgment, and pages 3, 7, 8, 10, 11, 12, 13, 14, 88 and others, which defendants say will fully disclose to the Court that the same evidence was elicited from the defendants in said supplementary proceedings as has been placed before the jury in this trial, and ask the Court to find the fact as to the truth of the facts alleged in said preliminary plea.

The defendants further offer the Court the record of the court to show the evidence taken before S. S. Nash, Referee, and which has been offered in evidence by the State in this case, and ask the Court to find the fact whether or not this evidence is not in substance the same evidence elicited from the defendants in the supplementary proceedings; and the defendants were not asked by plaintiffs to elicit the evidence before Nash, if they did not testify to these facts in supplemental proceedings, and they were not compelled to answer by the Court upon their objection, and if this question were not pertinent to the issue before said court, and if the Court should so find they ask that said evidence be excluded.

J. J. MARTIN,
G. M. T. FOUNTAIN,
Attorneys.

The State here contended:

1. That the defendants' plea that the bill of indictment was found upon illegal evidence was raised by them before

the jury were empannelled and that said plea had been passed on by the Court adversely to the defendants. [See exception (2), ante.]

2. That, after the empanelling of the jury and the beginning of the trial before them, certainly at this stage of the trial, such a plea in abatement or motion to quash will only be allowed at the discretion of the Court, and ought not now to be considered.

3. That as for the documentary report of the evidence before Referee Nash, it was produced because called for by the defendants themselves. [See exception (19) ante.]

4. That neither on the examination before Referee Nash, nor on that before Referee Battle, had either of the defendants urged their privilege to refuse to answer any question on the ground that the answer thereto might incriminate.

5. That all during the trial his Honor had carefully excluded evidence of any and every statement made by defendants, or either of them, in the supplementary proceedings, and also evidence of facts that became known by means of or in consequence of the examination in said proceedings.

The Court ruled on defendants' motion as follows:

The Court declines to find "the facts" as asked for, because:

(a) There has been no evidence that the charge in the bill of indictment and the testimony of the defendants in the supplementary proceedings are the same; the bill does not set out the "evidence" or facts, the finding of which is asked for by the defendants.

(b) For that all testimony offered or intended to be offered by the State, based on information obtained by the defendants' examination in supplementary proceedings, was excluded by the Court, and none was admitted.

(c) This prayer or request was made in writing (on this

sheet) after three of the counsel in the case had spoken to the jury, and is therefore too late and not in apt time, according to the rules of the Supreme and Superior Courts, and the trial was in progress and would have been necessarily suspended while the Court undertook to do what the defendants' counsel herein request.

SUTTON, J.

25. The defendants asked the Court to charge the jury as follows:

1. Before the defendants can be convicted on this bill of indictment, the State must show to the jury, beyond a reasonable doubt, that these defendants combined and confederated together to do some unlawful act, or a lawful act in an unlawful way.

This was given.

2. That unlawful here means indictable.

This was given

3. That, if the jury should believe that the defendants did combine and confederate together to ship some of their goods off to fictitious persons, to sell and apply the proceeds to their own use, this would not be unlawful, although it should be done secretly and should prevent the plaintiffs Baker and Adams from collecting a debt against them, for they had a right to sell their goods at any time before they were attached, either openly or secretly, and they would not be guilty.

This was declined, and the defendants excepted.

4. That if the jury should believe that C. B Mehegan shipped these goods without any concert of action or agreement between him and the other defendants, they would not be guilty, for it is the conspiracy to do an unlawful act and not the doing of the act for which they are indicted.

This was given with the following modification:

Provided, the defendant Mallett had no knowledge or information of the doing of any of these acts and there was no understanding, agreement or combination to do these acts with intent to cheat and defraud.

Defendants except.

5. That, if the jury should believe that the defendants owed Mrs. Mallett money for board, although said board was for the board of her husband and his family, and although said board was not due in law, yet they would not be guilty of an indictable offense, and you can not convict them upon this bill of indictment.

This was given with the following modification:

Provided, the act of her husband paying his wife his board was not done for the purpose of secreting his money or putting it beyond the creditors' reach, and so done with intent to cheat and defraud.

Defendants except.

6. That upon all the evidence you are instructed to find the defendants not guilty.

Declined. Defendants except.

J. J. MARTIN,
G. M. T. FOUNTAIN,
Attorneys.

26. The defendants also filed the following with the judge:

We insist that conspiracy in North Carolina is a misdemeanor, and as such is barred by the statute of limitations. (State v. Jackson, 82 N. C., 565.)

We therefore ask the Court to charge the jury the defendants are not guilty as charged in the bill of indictment.

This was declined, and the defendants excepted.

27. The defendants requested the judge to put his charge in writing, and he did so, as follows:

"A conspiracy is where two or more persons combine or conspire to do a wrongful act, or to injure any individual, or to do acts which are unlawful or prejudicial to the community; is an unlawful combination, a conspiracy and indictable. When two or more persons combine, agree and conspire to cheat and defraud any one, here, it is charged, Dr. Baker and Miss Adams, representing Mrs. Woolard's estate, then it is an unlawful combination and agreement and an indictable conspiracy, if you believe the testimony, and it so satisfies your mind beyond a reasonable doubt. The acts and declarations of the defendants are evidence for the jury to consider in determining whether or not the defendants did form the conspiracy for which they are indicted. The jury are charged that the acts and declarations of any one of the defendants, although evidence against the party making the same, are not evidence against the others, unless you find that there was a common purpose, agreement or understanding existing between them, and, in that case, the acts and declarations of each one of the parties who had the common purpose are competent evidence for the jury to consider against each one of said defendants who had such a common purpose to unlawfully cheat and defraud Dr. Julian M. Baker and Miss Ida M. Adams, representing the estate of Woolard. It is not material in an indictment for a conspiracy that the unlawful purpose should be accomplished, as the conspiracy or the illegal combination is the offense, if you are satisfied from the evidence beyond a reasonable doubt that such unlawful purpose or agreement existed. The defendants are entitled to all reasonable doubt; and if you have such reasonable doubts, it is your duty to acquit. But if upon the whole testimony, the facts, circumstances and surroundings of this case, you are satisfied beyond a reasonable doubt that this unlawful agreement, conspiracy and common design existed to cheat and defraud Baker

and Adams, then it is your duty to find them guilty. As to whether this is a felony or misdemeanor, it is not the province of the jury to inquire; that is a question of law, reserved for the Court to decide. As to the statute of limitations, I charge you that this indictment is within the legal times, and is not barred by lapse of time."

State contends:

1. Partners and nephew.
2. Falsified ledger.
3. Home account—change of words—Mrs. J. P. Mallett.
4. Credit to Mrs. Mallett, $6,000.
5. Shipping goods to fictitious persons.
6. Participation in that of Mehegan & M.
7. Send Latham to sell them.
8. Making way with their goods secretly.
9. Using proceeds for individual purposes.
10. Latham's false registration and his sale of goods for M. & M. sent to an unknown person.
11. The confidential relations between Sol. Woolard, and his widow after his death, and Mehegan.
12. Their sworn statement filed before Clerk Pennington as to their solvency, showing $17,500.00 net, except their debt to Woolard estate.
13. Their agreement as to the amount to be rendered as a compromise judgment.
14. Their refusal to comply with this compromise judgment.
15. Their evasion of Dr. Baker, who was seeking a settlement, and the counterclaim of $3,200, set up for the first time before Battle, Referee.
16. Mrs. Mallett, wife of one of the defendants, having possession of a large amount of money, buying bank stock in her name, after the attachment against the defendants had been instituted.
17. Mrs. Mallett shortly thereafter going into mercantile

business in her own name, and the three, Mehegan, Mallett and Latham, being in and about the store, seemingly in control.

18. That all items on the blotter are transferred to ledger, except the sales of goods to Kelford, Rocky Mount, etc.

19. Latham sent by M. & M to sell goods and his false registration.

Defendants' contentions are:

1. That the defendants did not combine and conspire together to cheat and defraud or do any other unlawful act.

2. That Mallett had no knowledge or connection with Mehegan in forming the acts charged.

3. That the defendants had a right to sell the goods to fictitious persons.

4. That Dr. Baker was not deceived.

The jury returned a verdict of guilty as to both defendants, C. B. Mehegan and J. P. Mallett.

Rule for new trial for

(1) Errors in charge of Court.

(2) Refusal to admit testimony.

(3) Exclusion of competent testimony.

(4) That the verdict of the jury was contrary to the weight of the evidence.

Rule discharged.

The Court held that this indictment was a misdemeanor. Judgment was then rendered by the Court as follows:

"It is ordered and adjudged that the defendants, C. B. Mehegan and J. P. Mallett, be each confined in the county jail for two years; at the expiration of said term to be discharged upon the payment of the costs according to law."

Notice of appeal given. Forty days allowed defendants to make out case on appeal, and forty days thereafter for the State to make out counter case on appeal or file exceptions to the defendants' case. Appeal bond in $25.00 ad-

judged sufficient. Appearance bond fixed at $1,000.00 for each defendant, to be justified before the Clerk of the Court. SUTTON, Judge.

NORTH CAROLINA—Edgecombe County.
September Term, 1898.

State
against
Mallett & Mehegan.

The defendants move for a new trial:

(1) For admission of incompetent testimony during the trial, and for other errors to which they excepted during the trial.

(2) For that the Court refused to give the jury the instructions as requested by defendants.

(3) For that the Court charged the jury that this indictment was not barred by the statute of limitations, and for other errors in charge, to be hereafter specified.

(4) For that the Court failed to call the jury's attention to the evidence set out in the written evidence taken before Nash, Referee, which was put in evidence by the State and commented on by defendants as tending to prove their innocence, or the affidavit of Dr. Baker, made on October 10, 1895, on which defendants contended that this indictment was barred, nor did the Court call the jury's attention to the defendants' contention on this evidence; for that the Court failed to find the facts on the plea in abatement as requested.

The above paper was filed by the defendants after judgment, and is indorsed "Filed October 1, 1898. G. W. Robbins, Clerk."

29. The additional assignment of error by the defendants in the case tendered by them are as follows:

For that the Court charged the jury:

(a) "A conspiracy is when two or more persons combine or conspire together to do a wrongful act, or to injure any individual, or to do acts which are unlawful or prejudicial to the community; is an unlawful agreement and combination and a conspiracy and indictable."

(b) "This is an unlawful agreement and combination and an indictable conspiracy, if you believe the testimony and it so satisfies your mind beyond a reasonable doubt."

(c) For that the Court charged the jury "that home account, change of name of Mrs. Mallett," was a circumstance to go to the jury to be considered by them as to the guilt of the defendants, and put it to the jury as one of the State's contentions, numbered (3), although he had theretofore ruled this evidence incompetent.

(d) The same as section (28), sub-section 4, ante, except that after the words "Nash, Referee," are inserted the words "and Battle, Referee."

30. What is set forth in section (34), sub-section (b), ante, is to be taken in connection with what his Honor told the jury, in the same sentence, which was, in effect, that a combination of two or more persons to cheat and defraud a person was indictable. See section (32), ante.

31. His Honor recapitulated the testimony verbally, directing their attention to the principal matters; and if there are any portions of the testimony that he failed to mention to them, the defendants' counsel did not, before verdict, direct his attention to such admission.

The State insisted that a combination of two or more persons to secrete or dispose of the property of a debtor for the purpose of defrauding his creditors was indictable. The defendants insisted that this was not so, urging that a conspiracy was a combination to do some indictable act only. The Court's decision was adverse to the defendants on this point and the jury were so instructed in the charge.

Nothing was stated verbally to the jury varying in any respect from the legal proposition submitted in writing.

32. The judge submitted the contentions of the respective parties as best he could gather the same. In regard to the State's contentions, the judge, in verbally rehearsing the evidence, told the jury that the facts relied on by the State must be proven, and must satisfy the jury of the existence of the conspiracy alleged, and that they must give the defendants the benefit of all reasonable doubt. This applied to the matter of the ledger of Mallett & Mehegan and its alleged alteration.

33. In regard to the statute of limitations, the State contended that a conspiracy to cheat and defraud was not within the statute, Code, section 1177, because—

1. It came under the head of deceit; and

2. It was not now a misdemeanor but a felony; and further, that even if that crime did come under the statute, it was committed in a secret manner, and that the executors, Baker and Adams, did not discover the principal overt act relied on, to-wit, the fact that Roberson, Parker, Bell and Owens were fictitious persons until subsequent to the examination in the supplementary proceedings; this is, within two years before the finding the first bill. Dr. Baker so testified, and he was not contradicted.

A case on appeal having been tendered to the undersigned on November 7, 1898, by the defendants, this is a counter case on appeal prepared by the counsel for the State, instead of a statement of exceptions to appellant's case.

WALTER E. DANIEL,
Solicitor.
GILLIAM & GILLIAM,
JACOB BATLE,
For the State.

Upon disagreement of counsel, upon due notice to counsel on both sides, they appeared, both being represented by counsel, at Fayetteville, N. C., February 24, 1899. After hearing the argument and various contentions, the case as stated above and foregoing on these sheets marked "A," together with the statement of evidence and proceedings on the typewritten copy marked "B," are adopted by me and settled as the appeal in this case, with the following additions and amendments, which shall be a part of the case on appeal as settled by me, viz:

1. The entire affidavit of Dr. J. M. Baker, of date October 10, 1895.

2. The written evidence introduced by defendants as had before E. Pennington, Referee, in supplementary proceedings, offered and introduced by defendants upon the plea of abatement.

3. The entire evidence had and taken before S. S. Nash, Referee, or such portions thereof as counsel on both sides may agree upon.

4. The letters written by Dr. J. M. Baker to the fictitious persons (to whom goods were alleged to have been shipped by defendants) were returned to Dr. Baker in October, 1895, as not having been called for by the addressees.

5. The additional assignments of error by the defendants, as set out in the State's counter case, page 31, article 29.

6. The contentions of defendants, on page 29 of their case on appeal, and in addition those which appear in counter case of State, page 31, article 31.

The typewritten copies "A" and "B," with these amendments and additions, will constitute the case settled on appeal by me, the counsel having disagreed.

February 25, 1899.

THOMAS H. SUTTON,
Former Judge First Criminal Circuit Court, N. C.

STATEMENT "B."

(The first five pages of this statement, being verbatim et seriatim the same as in Statement "A," are omitted.)

Dr. Julian M. Baker testifies as follows: "With Miss Ida M. Adams, I am administrator of Mrs. M. L. Woolard. She died in September, 1893; her husband, Solomon Woolard, died in 1889. Mallett & Mehegan were in partners in the mercantile business at the death of Mrs. Woolard. H. T. Latham was a clerk for Mallett & Mehegan. Latham is also a nephew of Mallett. I found among the papers of Mrs. Woolard a note of Mallett & Mehegan for $6,636.39, with interest at 8 per cent from January 25, 1890. (The contract between Mallett & Mehegan and Mrs. Woolard, Administratrix, is read by the witness.) This debt was due when I qualified as administrator of Mrs. Woolard; and in pursuance of the terms of the contract, I demanded of Mallet & Mehegan a statement of their financial condition. This demand was made before the supplementary proceedings were taken out. The demand was made prior to January 1, 1894, and this was before litigation."

The defendants object, because this demand and statement by Mallett & Mehegan, they were examined in supplementary proceedings. The objection overruled, and the defendants except.

4. The witness, Dr. Julian M. Baker, continued as follows: "This statement was under oath, and I saw it last when the matter was before Thos. H. Battle, Referee. (This was not in the supplementary proceedings.) I have made diligent search among my papers, in my office, in my attorney's office, and among my papers relating to the estate, of which I am administrator. I have searched for this paper a number of times and can not find it."

The State is allowed to prove the contents of said state-

ment. Defendants object, because defendants were examined in supplementary proceedings. Objection overruled. Exception by defendants.

5. The same witness continued as follows: "This statement showed that Mallett & Mehegan were worth $17,000.00 over and above all liabilities. The statement showed that they had cash on hand, $4,400.00, and that the indebtedness against them was about two thousand dollars, excluding what might be due to the Woolard estate. This statement was headed 'General Statement of Mallett & Mehegan,' and showed that they [were] worth, net, $17,000.00. In the reference trial before Thos. H. Battle (July 25, 1895), Mehegan was a voluntary witness in his own behalf. He testified then in regard to this statement. Mehegan was examined about this statement in the supplementary proceedings before the Clerk, about January 1, 1896."

The defendants object. Objection overruled. Exception by defendants.

6 Dr. Julian M. Baker testified further as follows: "Mehegan's testimony before Battle, Referee, was that Mallett & Mehegan were abundantly able to pay this debt. The compromise agreement was made and reported by T. H. Battle, Referee. The claim due the Woolard estate was $11,000.00, and the agreement or compromise to settle was about seven thousand dollars. The compromise agreement ended the matter before Battle, Referee. Mallett handed me a letter signed by Mallett & Mehegan. The following is a copy of same:

"'Tarboro, N. C., October 10, 1895.

"'Dr. J. M. Baker, Miss Ida M. Adams,
"'Administrators of M. L. Woolard.

"'Dear Sir and Miss: In settlement of your claim against us, we respectfully submit the following proposition, viz:

1. The report of the referee shall be four thousand dollars ($4,000.00), instead of five thousand nine hundred and fifty-two and seventy-three one-hundredths dollars ($5,952.73). To pay the amount ($4,000.00) we will deliver into the hands of the Clerk of the court, or cause to be delivered into his hands, on the day the report of the referee is affirmed and docketed, the following bonds and mortgages, which we will assign to you, viz:

"'Note against O. Burnett, and accrued interest to October 15, 1895,	$39.49
"'Note against M. H. Pippen, and accrued interest to October 15, 1895,	283.79
"'Mortgage against B. F. Havens, and accrued interest to October 15, 1895,	50.00
"'Five notes against J. A. Warren, secured by deed of trust,	696.83
"'We deduct $10.00 of accrued interest on above to equalize 6 per cent, with 8 per cent interest.	
"'Mortgage against W. T. Gray, Jr., and others, with accrued interest to October 15, 1895,	260.00
	1,330.11
"'Deed in trust for your benefit, by J. P. Mallett and wife, on Mallett's property, worth,	800.00
"'Cash,	2,412.39
	4,542.50

"'The debts and cash offered will amount to $4,542.50, which, when delivered to the Clerk of the Court, shall be in full satisfaction of your claim, principal, interest and court costs.

"'2. The release and discharge of C. B. Mehegan as agent and attorney for M. L. Woolard, Executrix, and M. L. Woolard, individually, as agreed, to be executed and

delivered to C. B. Mehegan when settlement as hereinbefore named is made with the Clerk of the court.

"'3. The report of the referee is to be recorded in full when $4,000.00 is substituted for $5,952.73.

"'We desire that the release and discharge to be executed by you to C. B. Mehegan shall set forth the period of time which he occupied such position, the amount of receipts and disbursements as a whole which he made (as per statement of Mr Gaskill), and the books and papers were examined by an expert accountant and found to be correct.

"'As we have the assurance that we can borrow the money if the proposition is accepted, we make it in good faith and request that you let us hear from you at your earliest convenience, and oblige,

"'Yours very truly,

"'MALLET & MEHEGAN.

"This letter was handed to me just before the Court at which the compromise judgment was to be rendered. In consequence of this letter I applied for a warrant of attachment against the goods and property of Mallett & Mehegan. The sheriff had to break their safe open; he could not get in the same any other way."

Dr. Baker was asked this question: How much money was found in the safe?

This was objected to by the defendants. Objection overruled. Exception by defendants.

Dr. Baker, in answer to the question, said, "About one hundred dollars is my recollection: may be more or less."

7. The witness continued, as follows: "I had a conference with Mallett & Mehegan at their instance in Mr. Gilliam's office. There was some dispute as to the calculation of interest, they contending that interest must be computed every thirty days on their store account against

Mrs. Woolard. This was the main point of difference between us. I agreed to settle upon their basis, and I afterwards called upon them repeatedly to settle in that way, and they refused."

The defendants object to this testimony. Objection overruled. Exception.

"Mehegan was examined before Battle, Referee. He was asked if, when they attended the conference with me to get at the basis of settlement, they did so in good faith, and he said he did not, and that it was decided between him and Mallett to refuse to pay this debt and to force me to sue and get what I could. Mehegan made a claim for services, $800.00 a year for four years, services rendered the Woolard estate. This claim was not made at our conference, but subsequent to it. Prior to that time he had not made any such claim against the estate. Mallett, after the conference, refused to talk to me about this debt."

The defendants object to this evidence.

Dr. Baker was asked this question by them: State whether or not you heard this book (which is a book of Mallett & Mehegan, found by sheriff when he levied the attachment), referred to by Mallett & Mehegan at the examination before Mr. Nash when they, the defendants, offered themselves as witnesses in their own behalf. (The sheriff caused the personal property exemption of Mallett & Mehegan each to be allotted, and each of them appealed from the allotment and said cases in the Superior Court on appeal were referred to S. S. Nash, and he heard said cases in Tarboro in September, 1897.)

This examination before Nash subsequent to the supplementary proceedings.

The witness had stated that the first time he heard this book referred to was at the supplementary proceedings examination before Clerk.

The defendants object to this evidence, because the tes-

timony now offered was subsequent to the examination in the supplementary proceedings. The objection was overruled. Exception by defendants.

It was admitted that the testimony now offered was the declarations of the defendants before Nash, Referee, when the defendants offered themselves as witnesses voluntarily in their own behalf.

8. The same witness proceeded, as follows: "This is a day-book of Mallett & Mehegan. At the examination before Mr. Nash, Mallett said it was a counter-book and that the entries were transferred to the ledger-book. The entries are in Mehegan's handwriting, viz:

"E. T. Roberson, Robersonville, October 4, 1895, verb. or., - - - - - -	$189.09
"T. H. Parker, Rocky Mount, October 5, 1895, verb. or., - - - - - -	148.77
"S. W. Bell, Kelford, October 7, 1895, verb. or.,	168.51
"M. H. Owens, Williamston, October 9, 1895, verb. or., - - - - - - -	129.56
	"635.93"

The defendants ask that an exception be again made, and the Court remarked that their objection was already stated more than once and was ample to protect the defendants, and that it was necessary to write down another objection relating to the same matter more than once objected to and exception taken and noted.

To this the defendants except.

9. The witness then proceeded: "The witness, Mallett, said that the goods were shipped to E. T. Roberson and the other parties above set forth. The abbreviation 'O. N.' means that the goods were shipped to order and that they were to be notified. I know of my own personal knowledge that there is no such person as S. W. Bell at Kelford, N. C."

The defendants object and allege that the statements of the defendants before Nash, Referee, were not voluntary because, while they did offer themselves as witnesses in their own behalf, yet upon cross-examination, when this examination was gone into and this information elicited, they were not voluntary witnesses. Objection overruled. Exception by defendants.

10. The witness, Dr. Julian M. Baker, proceeded as follows: "Mehegan said he had heard of S. W. Bell, but this shipment was not intended for him. He said that the other persons were fictitious. The letters 'O. N.' meant, so Mallett & Mehegan said, 'order notify,' that is, to deliver to the consignee of B-L. and B-L. was made out to Mallett & Mehegan. This was all on the examination before Nash, Referee. Mallett said that he had no accurate knowledge of the shipment. By that he said he meant he did not pack or mark them, that is, the goods, that he saw them packed and shipped. Mallett said he did not know any of these parties to whom the goods were shipped. Mehegan said he redeemed and sold the goods sent to Robersonville. Mallett said he went and got the goods in Rocky Mount. Mehegan said he sent Latham to Kelford and got the goods sent there. Mallett & Mehegan said they got these goods some days after the attachment, and they sold some and shipped some to Greenville and sold them, put the money in their pockets and spent it. Mehegan said he shipped these goods to fictitious persons to get the money to pay me. They paid me nothing. The examination in the supplementary proceedings and that before Nash, Referee, were nearly alike. I am giving in my testimony that which came out in their statement before Nash, Referee There is $4,500.00 still due to the Woolard estate, due under the basis of the compromise agreement. The book now shown me is the ledger of Mallett & Mehegan used by them, and before Pennington, Clerk,

in the supplementary proceedings. One of the defendants was examined as to the contents of this book, and it was taken by the sheriff under the levy of the attachment. Afterwards, the sheriff and I carried this book to Mr. Gilliam's office. The sheriff, under attachment proceedings, garnisheed the debts of account in the book, the ledger."

The defendants object to the contents of the book being proven, because the book was before the Clerk in the supplementary proceedings. The State claims and says the information now asked for was obtained by the witness before the supplementary proceedings were instituted. They propose to ask the witness as to such information only, not as to any information obtained by him upon the examination in the supplementary proceedings. Objection overruled. Exception by defendants.

11. The account of Mrs. Mallett was examined by the witness before the supplementary proceedings were instituted, and the State offered the account which is on the books as made by defendant, prior to litigation. The account of Mrs. Mallett of ledger (this account was examined into before referee in supplementary proceedings and defendants examined upon it). The account of Mrs. Mallett, at pages 108 to 109, 359, 375, 376, 377, 526, 630, 631, 676, 717, the witness, Julian M. Baker, was examined about this account. The said book (ledger) will be sent to the Appeliate Court, that is, the Superior Court. There was evidence tending to show: That C. B. Mehegan lived with his sister, S. Mallett, and her husband, the said John P. Mallett; and a long account in the ledger of Mallett & Mehegan for family supplies, etc., simply headed "Home Account," had been changed so as to make it appear to be against Mrs. John P. Mallett, and this account was credited in July, 1895, with large amounts, as follows:

"By Board of C. B. Mehegan to July 1, 1895,	1,237.50
"By Board of Clerk, H. T. Latham, - -	1,218.75
	$2,456.25
"By account of John P. Mallett and family ('and family' erased in the ledger) to July 1, 1895,	3,300.00
"And on September 2, 1895, by board of J. P. Mallett for July, August and September, -	150.00
"By board of Mallett and Latham, for July and August, - - - - -	75.00
"And for September, - - - -	37.50
"By board of Mallett, for September, - -	50.00
	6,068.75

The ledger shows cash paid by Mallett & Mehegan to Mrs. John P. Mallett, on July 19, 1895, $873.04; that the heading of this account in the ledger had on many pages been altered. Before Nash, Referee, Mehegan said he had paid to Mrs. Woolard $1,000.00 in cash. The account against Bell and the others on the day-book do not appear in the ledger. The defendants aver that the words "J. P.," preceding Mallett was the subject of examination in the supplementary proceedings, and that this evidence and the book (ledger) ought to be excluded. The witness then stated that he noted all these accounts and had information concerning them before the examination in the supplementary proceedings were instituted, except the words "J. P.," with Mrs. and the letter "S" following Mrs., and that he did not notice that till now.

The Court excluded all testimony based on information received from the examination of defendants in the supplementary proceedings, and allowed only such as was had by the witness before the institution of the supplementary proceedings, and the witness proceeded: "The defendant Mehegan stated before Nash, Referee, that he sent Latham

to Kelford to get the goods; that Mallett had particular direction in regard to selling the goods. I did not get any information that there was no such person as S. W. Bell and that the shipments were to fictitious persons until I went to Kelford and inquired for Bell. This was after the examination in the supplementary proceedings."

(It was not contradicted that Dr. Julian M. Baker's visit to Kelford was within two years before the finding of the first bill of indictment.)

The witness proceeded as follows: "I found at Kelford that there was no such person in existence as Bell, and afterwards, pursuing the inquiry, I learned that there were no such persons as Owens and others to whom the goods were shipped on the alleged verbal orders. Up to this inquiry I thought these were real and genuine sales. I began to trace and search for these goods shipped to S. W. Bell and others before the supplementary proceedings were begun. I had the information from the small day-book as to these shipments, and thought then they were real shipments, but found out they were all fictitious transactions. I wrote letters to Rocky Mount, Williamston and Robersonville, addressed to the parties named, and said letters were returned to me, as they were not called for. These defendants were examined in the supplementary proceedings about the judgment in the Superior Court. They had previously been examined [before] this before Thos. H. Battle, Referee. They were examined in the supplementary proceedings about their ability to pay the judgment. The index figures (in the ledger of Mallett & Mehegan), relating to Mr. Mallett's account, show one or more entries in different ink of recent writing and added afterwards. The 2 and 6 looked like they were made in the same ink. (The ledger and index are admitted in evidence and exhibited to the jury by the defendants.) Fifty dollars, I think, is a fair price for the support of a

man and his wife and 4 children in Tarboro per month." (The letter marked "a," from John F. Shackelford, is admitted in evidence.)

The witness, Dr. Julian M. Baker, was asked this question: Did you go before the grand jury when this bill was found, and did Mr. H. A. Gilliam go with you?

Answer. We both went before the grand jury at different times.

Question. Did you carry with you before the grand jury, when you testified there in this bill of indictment, the evidence taken in the supplementary proceedings?

The question was objected to by the State, for the reason that all the testimony offered by the State, based upon information or evidence, oral or written, obtained upon the examination in the supplementary proceedings, had been excluded by the State. Objection sustained. Defendants except.

12. The defendants' counsel here asked the Court to find that the charge in the bill of indictment is the same as the evidence contained in the examination of the defendants in the supplementary proceedings. The Court held that it was impossible to do so, for the reason that the bill of indictment did not set forth evidence and need not do so, and there was no way for the Court to find the facts as asked for by the defendants' counsel.

13. C. L. L. Cobb, the witness for the State, testified as follows: "I have been living at Kelford, N. C., for six years last December. I am in the hotel and livery business. There is no such person as S. W. Bell at Kelford or in that vicinity. I was living in Kelford in October, 1895. I met a man introduced to me as 'H. T. Latham.' I met him at the depot, morning train. There were goods marked 'S. W. Bell.'"

The defendants object to that part of witness' testimony relating to having met a man introduced to him as

"H. T. Latham." Objection overruled. Exception by defendants.

14. A book was here exhibited to the witness, and he proceeded as follows: "This book is my hotel register. The person I saw as H. T. Latham registered in the name of H. T. Thomas or H. T. Latham. Both names are written there on the 16th of October, 1895. (The word 'Latham' being written over the word 'Thomas.') Latham offered the goods sent to S. W. Bell for sale."

The defendants object because this matter was examined about in the supplementary proceedings after the witness saw Latham at Kelford, and because H. T. Latham is not on trial. Admitted for the reason that it is heretofore in evidence that Mehegan, one of the defendants, stated before Nash, Referee, that he, Mehegan, sent Latham to Kelford to sell the goods. Exception by defendants.

The witness, Cobb, proceeded: "Latham offered to sell me the goods marked to S. W. Bell, and said he was going to try to sell them."

"Mr. Mallett stayed at the store of Mallett & Mehegan and gave his attention to it. (The witness then testified as to the appearance of the ledger which was before him, page 526, Home Account, that changes had been made in the account.) I do not say that he stayed at the store every day, but I do say that he stayed there generally." (This paragraph of six lines must be a part of Dr. Baker's testimony, misplaced here. C. S. C.).

15. E. Miller, witness for State, testified as follows: "I know the defendants. Mehegan showed me five $5.00 pieces in gold, and after that he showed me many kinds of money. This was in 1897."

The defendants object. Objection overruled. Exception by defendants.

16 The said witness proceeded: "And in January, 1898, he said he had a whole lot of money now in his

pocket, and took it out and showed me a large roll. I said it was $1-dollar bills, and he said they were $20-dollar bills. He said he had twice as much in another pocket and three times as much coming by express that day. He said some people said he had no money, but that was his business, that no one knew, and it was no one else's business. After this, Mehegan, when I was summoned as a witness, asked me what I was going to say. I told him what I was going to say. I told him I should tell only what I knew. He said people talked too much. He called me in a room and said this."

Cross-examination.—"I came from Russia. I have been here three years, going on four. I went into business here. I borrowed some money through Mehegan. Mehegan said the gold money belonged to his aunt. My wife is in business now on her own account. This money was shown me about the time the Citizens Bank was started. He said a lot of people said he had money, but it wasn't true. Mehegan told me if I was summoned to tell all I knew. This money was shown me just before his brother started the bank."

NORTH CAROLINA—Edgecombe County.

Circuit Criminal Court, Special Term, Sept. 26, 1898.

State
against
J. P. Mallett and C. B. Mehegan.

The defendants put the evidence taken in the supplementary proceedings in evidence before his Honor, Judge presiding, upon their preliminary plea, in which that [they] state: "That every fact alleged in the indictment in this case, the defendants were each fully examined about in

said supplementary proceedings," and especially called the Court's attention to page 3 of the evidence taken in said supplementary proceedings, in which the object of said examination is stated by plaintiff's counsel to be "To show the defendants went to work in a systematic way for purpose to cheat J. M. Baker and Ida M. Adams, Administrators of M. L. Woolard, etc., and to fraudulently dispose of their property to prevent the recovery of their judgment, and pages 3, 7, 8, 10, 11, 12, 13, 14, 88, and others, which defendants say will fully disclose to the Court that the same evidence was elicited from the defendants in said supplementary proceedings as has been placed before the jury in this trial, and ask the Court to find the fact as to the truth of the facts alleged in said preliminary plea. The defendants further offer the Court the record of the court to show the evidence taken before S. S. Nash, Referee, and which has been offered in evidence by the State in this case, and ask the Court to find the fact whether or not this evidence is not in substance the same evidence elicited from the defendants in the supplementary proceedings; and the defendants were not asked by plaintiffs to elicit the evidence before Nash, if they did not testify to these facts in supplemental proceedings, and they were not compelled to answer by the Court upon their objection, and if this question were not pertinent to the issue before said Court, and if the Court should so find, they ask that said evidence be excluded.

J. J. MARTIN,
G. M. T. FOUNTAIN,
Attorneys.

30. The defendants asked the Court to charge the jury as follows:

1. Before the defendants can be convicted upon this bill of indictment, the State must show to the jury, beyond a

reasonable doubt, that these defendants combined and confederated together to do some unlawful act, or a lawful act in an unlawful way.

This was given.

2. That unlawful here means indictable.

This was given.

3. That if the jury should believe that the defendants did combine and confederate together to ship some of their goods off to fictitious persons, to sell and apply the proceeds to their own use, this would not be unlawful, although it should be done secretly and should prevent the plaintiffs Baker and Adams from collecting a debt against them, for they had a right to sell their goods at any time before they were attached, either openly or secretly, and they would not be guilty.

This was declined, and the defendants excepted.

4. That if the jury should believe that C. B. Mehegan shipped these goods without any concert of action or agreement between him and the other defendants, they would not be guilty, for it is the conspiracy to do an unlawful act and not doing the act for which they are indicted.

This was given with the following modification:

Provided, the defendant Mallett had no knowledge or information of the doing of any of these acts, and there was no understanding, agreement or combination to do these acts with intent to cheat and defraud.

Defendants except.

5. That if the jury should believe that the defendants owed Mrs. Mallett money for board, although said board was for the board of her husband and family, and although said board was not due in law, yet they would be (?) guilty of an indictable offense, and you can not convict them upon this indictment.

This was given with the following modification:

Provided, the act of her husband paying his wife board was not done for the purpose of secreting his money or putting it beyond the creditors' reach, and so done with intent to cheat and defraud.

Defendants except.

6. That upon all the evidence you are instructed to find the defendants not guilty.

Declined. Defendants except.

J. J. MARTIN,
G. M. T. FOUNTAIN,
Attorneys.

31. The defendants also filed the following with the judge:

"We insist that conspiracy in North Carolina is a misdemeanor, and as such is barred by the statute of limitations. (State v. Jackson, 82 N. C., 565.) We therefore ask the Court to charge the jury the defendants are not guilty as charged in the bill of indictment."

This was declined, and the defendants excepted.

32. The defendants requested the judge to put his charge in writing, and he did so, as follows:

"A conspiracy is where two or more persons combine or conspire to do a wrongful act, or to injure any individual, or to do acts which are unlawful or prejudicial to the community; is an unlawful agreement or combination, a conspiracy, and indictable. When two or more persons combine, agree and conspire to cheat and defraud any one, here, it is charged, Dr. Baker and Miss Adams, representing the Woolard estate, then it is a combination and agreement and an indictable conspiracy, if you believe the testimony, and it so satisfies your mind beyond a reasonable doubt.

"The acts and declarations of the defendants are evi-

dence for the jury to consider in determining whether or not the defendants did form the conspiracy for which they are indicted. The jury are charged that the acts and declarations of any one of the defendants, although evidence against the party making the same are not evidence against the others, unless you find that there was a common purpose, agreement or understanding existing between them, and, in that case, the acts and declarations of each one of the parties who had the common purpose are competent evidence for the jury to consider as against each one of said defendants who had such common purpose, to unlawfully cheat and defraud Dr. Julian M. Baker and Miss Adams, representing the estate of Woolard. It is not material in an indictment for a conspiracy that the unlawful purpose should be accomplished, as the conspiracy of the illegal combination is the offense, if you are satisfied from the evidence beyond a reasonable doubt that such unlawful purpose or agreement existed. The defendants are entitled to all reasonable doubts, and if you have such reasonable doubts, it is your duty to acquit. But if, upon the whole testimony, the facts, circumstances and surroundings of this case, you are satisfied beyond a reasonable doubt that this unlawful agreement, conspiracy and common design existed to cheat and defraud Baker and Adams, then it is your duty to find them guilty. As to whether this is a felony or misdemeanor, it is not the province of the jury to inquire. That is a question of law reserved for the Court to decide. As to the statute of limitations, I charge you that this indictment is within the legal time, and not barred by the lapse of time." (In the charge on file, the word "existed," in line 8 from the bottom, does not appear.)

State contends:

1. Partners and nephew.
2. Falsified ledger.

3. Home account—change of words—Mrs. J. P. Mallett.
4. Credit to Mrs. Mallett, $6,000.00.
5. Shipping goods to fictitious persons.
6. Participation in that of Mallett & M.
7. Send Latham to sell them.
8. Making way with the goods secretly.
9. Using proceeds for individual purposes.
10. Latham's false registration and his sale of goods for M. & M., sent to an unknown person.
11. The confidential relation between Sol. Woolard and his widow after his death, and Mehegan.
12. Their sworn statement before Clerk Pennington as to their solvency, showing $17,500.00 net, except their debt to Woolard estate.
13. Their agreement as to the amount to be rendered as a compromise judgment.
14. Their refusal to comply with this compromise judgment.
15. Their evasion of Dr. Baker, who is seeking a settlement, and the counter-claim of $3,200.00, set up for the first time before Battle, Referee.
16. Mrs. Mallett, wife of one of the defendants, having possession of a large amount of money, and buying bank stock in her name, after the attachment against the defendants had been instituted.
17. Mrs. Mallett shortly after going into the mercantile business in her own name, and the three, Mehegan, Mallett and Latham, being in and about the store, seemingly in control.
18. That all items of the blotter are transferred to ledger, except the sales of goods to Kelford, Rocky Mount, etc.
19. Latham sent by M. & M. to sell goods and his false registration.

The Court held that this indictment was a misdemeanor.

Judgment was then rendered by the Court as follows:

It is ordered and adjudged that the defendants, C. B. Mehegan and J. P. Mallett, be each confined in the county jail for two years, at the expiration of said term to be discharged upon the payment of the costs according to law.

EDGECOMBE COUNTY—Superior Court.
June Term, 1899.

State
against
J. P. Mallett and C. B. Mehegan.

This cause coming on to be heard before Hoke, Judge Superior Court holding said term, on appeal of defendants from a verdict and judgment had against them in Criminal Court of said county, the Court is of opinion that there was substantial error committed on trial of cause against defendants therein, for that, among other reasons, the facts developed on examination defendants in proceedings supplemental to execution were, over their objections, used to effect their conviction. Both directly in evidence has Dr. Baker and Mr. Henry Gilliam, and indirectly by placing before this jury the evidence of these defendants brought out by cross-examination before S. S. Nash, Referee, in which examination defendants were asked concerning some matters developed in said supplementary proceedings. It is true the case on appeal states that the judge held and so declared that statements made by defendants in said supplementary proceedings were not competent evidence against defendants on this trial; but it is perfectly patent, on inspection of the evidence set out, that the facts brought out on examination of defendants in said supplemental proceedings were necessarily used to develop their evidence before Nash, Referee, and both in this way and in other particulars directly was this exam-

ination in supplemental proceedings used to effect their conviction, contrary to statute.

The Court is also of opinion that judge erred in not leaving jury to question whether the facts constituting crime charged were discovered within two years before action brought, this being a misdemeanor and barred, unless accruing or facts discovered with [within] said two years.

It is therefore adjudged that defendants are entitled to a new trial, and it is ordered that this opinion and judgment be certified to Criminal Court to next term, that new trial may be had pursuant to this judgment.

The State excepts and takes an appeal. Notice waived.

W. A. HOKE,
Judge Presiding.

NORTH CAROLINA—Superior Court.
June Term, 1899.

State
against
J. P. Mallett and C. B. Mehegan, Defendants.

This was a criminal action tried before Sutton, Judge, and jury, at Special Term, September, 1898, Criminal Court, and heard on appeal before Hoke, Judge, at June Term, 1899, Superior Court Edgecombe County. There was a verdict rendered against the defendants at said Criminal Court and sentence had against them, from which they appealed to Superior Court.

Upon hearing said appeal his Honor Judge Hoke granted a new trial to defendants, and rendered judgment as appears of record. From this judgment the State prayed and was allowed an appeal in open court. Notice waived, and State allowed thirty days within which to serve and file

case on appeal. Defendants allowed thirty days thereafter to serve and file counter case.

In the case on appeal, served in apt time, the State assigns the following errors, which it asserts and claims were made by the Court in granting said new trial and in the judgment entered on said appeal: The State assigns for error the finding and conclusion of his Honor, that the facts developed on examination of the defendants in proceedings supplemental to execution were over the objections of the defendants, and were used to secure their conviction; that the evidence of defendants was brought before Nash, Referee, on their cross-examination; that the findings of Sutton, Judge, as to the exclusion of all evidence developed in supplemental proceedings, are overruled by his Honor, Hoke, Judge; and that his Honor, Sutton, Judge, committed error in not leaving to the jury the question whether the facts constituting the crime charged were discovered within two years before institution of this prosecution, and that the crime charged was a misdemeanor and barred within two years after the discovery of the facts.

The record proper, including the judgment of Judge Hoke, entered on appeal, and also the cases on appeal prepared by judge Criminal Court, being the case on appeal and amended case, as made by said judge, with the evidence, exhibits, exceptions, etc., which accompany the same, together with this statement, shall constitute case on appeal to Supreme Court.

Above is settled as case on appeal to Supreme Court by the judge, counsel having disagreed and been duly notified.

W. A. HOKE,
Judge Presiding.

State
against
Mallett & Mehegan.

Clark, J. This is an indictment for "a conspiracy to cheat and defraud," and an appeal therein to this Court by the State from a judgment of the Superior Court overruling the judgment of the Circuit Criminal Court, held in Edgecombe County. In State v. Davidson, 124 N. C., 839, it was pointed out that an appeal should be, in such cases, at the instance of the State; and attention was called to the inadvertence of its Legislature (which alone has the power to prescribe the instances in which the State may appeal) in not amending section 1237, so as to embrace appeals by the State in cases going to the Superior Court from the Western Criminal Circuit. This inadvertence did not occur in the act, chapter 471, Laws 1899, creating the Eastern District Court, section 6, whereof expressly provides for such appeals. Section 23 of said act transferred to the new Eastern District Criminal Court all causes pending in the First Criminal Circuit Court. The judgment of the Superior Court overruled the Criminal Court on two grounds:

1. Because facts developed on the examination of the defendants in supplementary proceedings were used to effect their conviction, contrary to the provisions of Code, section 488 (5), which provides that the answers of a defendant in "supplementary proceedings" shall not be used as evidence against him in any criminal proceeding or prosecution.

2. That the judge of the Criminal Court, having held that this offense was a misdemeanor which, by section 1177 of The Code, was barred only by the lapse of two years from its discovery, he erred in not submitting to the jury whether the facts constituting the crime were discovered within two years before action begun.

As to the first point, a careful inspection of the record and case on appeal, sent up from the Criminal Court to the Superior Court, shows that the judge of the Criminal Court in fact carefully excluded from the jury all evidence of the examination of the defendants in supplementary proceedings and "all testimony based on instruction received from the examination of defendants in such proceedings, and only allowed such as was by the witness before the institution of the supplementary proceedings"; and the same care to exclude such testimony was taken by him throughout the trial. There were proceedings, subsequent to the supplementary proceedings, and entirely independent of them, and for a different purpose, before S. S. Nash, Referee, and T. H. Battle, Referee, at which the defendants offered themselves as voluntary witnesses, and at which it is possible and probable they may have made statements similar to those they had made before the Clerk in supplementary proceedings, but such statements were not privileged and were competent to be given in evidence against them, (State v. Hawkins, 115 N. C., 712), and, indeed, the defendants did not except as to them.

As to the second point, the judge of the Criminal Court rested his ruling upon the ground that the offense, though a misdemeanor, was one committed by deceit, and as the evidence was uncontradicted that the discovery thereof was within two years before the beginning of the prosecution, the offense was not barred. In that view of the case, although the evidence was uncontradicted, the matter, in a criminal action, should have been left to the jury (State v. Riley, 113 N. C., 648), with an instruction that, if the jury believed uncontradicted evidence, that the offense has been discovered within the two years before prosecution begun, the statute of limitation was not a bar. His Honor, however, correctly held, as a matter of law, that the prosecution was not barred by the lapse of time, and his having given a wrong reason therefor will not vitiate the ruling.

Up the Act of 1891, chapter 205, in this State, we followed the somewhat arbitrary common-law rule as to what crimes were felonious and what were misdemeanors; and under that conspiracy, and even such grave crimes as perjury and forging, were misdemeanors. The Act of 1891, North Carolina, adopted the rule now almost universally prevalent, by which the nature of the punishment determines the classification of offenses; those which may be punished capitally or by imprisonment in the penitentiary are felonious (as to which there is no statute of limitations), and all others are misdemeanors, as to which prosecutions in this State are barred by two years.

The Code, section 1097, provides that misdemeanors created by statute, when no specific punishment was prescribed, should be punished as at common law; and further enacted that as to misdemeanors they were "infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender ought to be punished by imprisonment in the county jail or penitentiary." This, by virtue of the subsequent Act of 1891, chapter 205, made the classes of misdemeanors thus subjected to punishment in the penitentiary felonies. The offense charged here, and of which the defendants have been convicted, was done "with deceit and intent to defraud." It is the very essence and substance of it. The Code, section 1097, having given the courts power to punish it with imprisonment in the penitentiary, the Act of 1891, aforesaid, makes it a felony and the statute of limitation is not a bar. The indictment properly charges the offense to have been committed "feloniously." (State v. Purdie, 67 N C., 25; State v. Bunting, 119 N. C., 1200.)

The judgment of the Superior Court must be reversed, and, as nothing further remains to be done in that court, this judgment will be certified direct to the Eastern Dis-

trict Criminal Court in Edgecombe County, that the sentence imposed by that court may be carried into execution.

Reversed.

A PETITION.

IN THE SUPREME COURT—September Term, 1897.

State
against
John P. Mallett and C. B. Mehegan.

The petition of the defendants, John P. Mallett and C. B. Mehegan, respectfully showeth to the Court:

1. That the opinion of the Court was rendered herein on the ... day of October, 1899, and will be certified next Monday to the Circuit District Criminal Court of Edgecombe County, and the sentence of said Court, to-wit, two years confinement in the common jail of Edgecombe County, will be at once put into execution unless relief is granted by this Court.

2. That this indictment was tried before his Honor Judge Sutton at February Term, 1898, of the Circuit Criminal Court of Edgecombe County. Divers exceptions were made to the rulings of the Court, and from this judgment the defendants appealed to the Superior Court. Said appeal was heard at June Term, 1899, of said Superior Court by his Honor Judge Hoke. Judge Hoke passed only on two of the defendants' exceptions, to-wit, the statute of limitations and the admission of evidence elicited in the supplemental proceedings. Upon these points he reversed Judge Sutton and ordered a new trial to be granted. The Solicitor for the State appealed to the Supreme Court. Your petitioners respectfully say that if the Court finds error in these rulings of Judge Hoke, it should go further and examine the other exceptions of the defendants. For,

if the order directing a new trial was right, it does not matter that an improper reason was given for it.

Your petitioners are advised that they have a right to have their whole case considered by the Court. Judge Hoke did not consider the other exceptions, because, in his view of the law, he did not deem it necessary. If the Court now reverses him and the other exceptions are not considered, the defendants will be confined for two years in the common jail of Edgecombe County, because, notwithstanding good grounds of exceptions, the judge below placed his rulings on a wrong ground.

3. Your petitioners call special attention to the following exceptions:

That prior to the beginning of this action an attachment against the property of the defendant was issued at the instance of J. M. Baker, Administrator of M. L. Woolard and of Solomon Woolard, who is the chief prosecuting witness in this case. By virtue of said attachment the Sheriff of Edgecombe County seized the ledger and counter-book of the defendants and have kept possession of them up to this time. At the trial of the present indictment the said books so wrongfully taken from the defendants were offered in evidence.

The defendants objected. The objection was overruled, and the defendants excepted (See record, pp. 44 and 45.)

In this the defendants submit that there was error. For it is, in effect, making the defendants give evidence against themselves under the principles laid down in the case of Boyd v. United States, 116 U. S., 616. At the argument of this case at this term counsel had not found this authority, and his argument did not go upon this ground. Since said hearing he found the said case, and they are advised that the principle and the authority are decisive, and would at once satisfy the Court of the defendants' right to a new trial, if the matter could be brought to its attention.

4. That at the time of the commission of the alleged offense no appeal was allowed to the State from any ruling of the judge of the Superior Court which granted a new trial to a defendant convicted in the Criminal Court. If the statute of 1899, section 6 of chapter 47, grants such appeal the, defendants submit that it is ex post facto and void as to them (King v. Missouri, 107 U. S., 221.)

5. That if such statute has the effect aforesaid it denies to the defendants the equal protection of the laws and is void under the Fourteenth Amendment to the Constitution of the United States, because the defendants in criminal actions tried in the Western Criminal District are exempt from this provision. In that district there is no such right of appeal by the State. (State v. Davidson, 124 N. C., 839.)

6. But the defendants submit that the said statute should be restricted to cases arising after its passage. At the time of the passage of the act the present case had already been tried and appeal taken by the defendant to the Superior Court.

7. That his Honor Judge Sutton overruled the defendants' preliminary plea to the bill of February Term, 1898 (see pp. 6, 7 and 8 of the record); and they expressly asked him to find the facts on said plea (pp. 58 and 59 of record), which he refused to do (pp. 59 and 60 of the record). His Honor, among other things, stated as a reason for not doing so, that the prayer or request was made in writing after three of the counsel had spoken on the merits, and was not therefore in apt time. It is respectfully insisted that his Honor misapprehended the rule. It is true that his Honor had already overruled the plea and the defendants had excepted. But at any time prior to the end of the trial and perhaps to the end of the court, the defendants had a right to have the facts, found with a view to an appeal, and his Honor erred in refusing to find said facts, after being requested to do so.

8. That the counsel of the defendants were engaged in the preparation of a petition to rehear their case when they discovered that the Court had ruled that no such petition was allowed in criminal cases. Your petitioners respectfully submit to the Court that there is no reason in law why the same benefits in practice should not be allowed in cases where a man's life and liberty are involved as in cases involving his property; and if by some inadvertance or oversight on the part of counsel or of the Court, some important principle or authority has been overlooked or a mistake has been made, an opportunity should be presented for correcting it. At any rate, the case is still in fieri and under the control of the Court, and your petitioners are satisfied that the Court will correct any mistake it may have made.

Your petitioners therefore pray that the Clerk be directed to defer the certifying and transmission of the opinion and judgment of this Court till further order in the premises: that the Court will allow them to file with some one of the judges an application to rehear, which he, in his discretion, may approve; that at any rate a reargument be allowed either of the whole case or such exceptions as the Court may deem proper; that notice issue to opposing counsel, and for such other and further relief as may be proper and the nature of the case demands.

And your petitioners will ever pray.

G. M. T. FOUNTAIN,
R. O. BURTON,
Attorneys for Petitioners.

State
against
Mallett & Mehegan.
From Edgecombe County.

Clark, J. After the above opinion of the Court had been filed, but before it had been certified down, the defendants filed a petition for reargument, assigning the following grounds:

(1) Because there were other exceptions raised by the defendants on their appeal from the Criminal Court to the Superior Court, which the judge of the latter court did not pass upon. The defendants should have requested the judge to pass upon those exceptions, and if he had failed to do so, or had held adversely to the defendants, they should have appealed. (State v. Bost, at this term.) In fact, those exceptions are trivial, and the judge passed upon all that merited his attention; but as the practice in this class of appeals was possibly not understood, we will consider now the only exception which the petition to reargue insists the judge of the Superior Court should have passed upon and held in favor of the defendants, i. e., that the sheriff, by attachment, having seized the ledger and counter-book of the defendants, they were put in evidence against them. There certainly was no error in using the defendant's own entries against them. The shoes of a party charged with crime can be taken and fitted to tracks as evidence, and in one case, when a party charged with crime was made to put his foot into the tracks, the fact that it fitted was held competent. (State v. Graham, 74 N. C., 648.) Nor has it ever been suspected that if, upon a search warrant, stolen goods are found in possession of the prisoner, that fact can not be used against him. Here the books came legally into possession of another and the tell-tale entries were competent against the parties making them in the course of their business.

(2) The next exception in the petition is that at the time of the offense the statute allowed no appeal to the State from the ruling of the Superior Court judge. But the defendants had no "vested rights" in the remedies and methods of procedure in trial for crime. They can not be said to have committed this crime relying upon the fact that there was no appeal given the State in such cases. If they had considered that matter they must have known that the State had as much power to amend section 1237 as it had to pass it, and they committed the crime subject to the probability that appeals in rulings upon matters of law would be given the State from these intermediate courts. At any rate, their complaint is of errors in the trial court, and when they appealed to the Superior Court they did so by virtue of an act which provided that the rulings of that court upon their case could be reviewed at the instance of the State in a still higher court. The appeal was certified up to the Superior Court April 1, 1899, and on July 7, 1899, the appeal was taken to this Court. The statute regulating appeals from the Eastern District Criminal Court, chapter 471, Laws 1899, was ratified March 6, 1899.

(3) The petition further urges that it is a discrimination, because the act creating the Western District Criminal Court fails to give the State the right of appeal We do not see how such omission injures the defendants. The State has control of its own legislation as to the cases in which it will permit appeals in its own behalf in its courts. (Hurtado v. California, 110 U. S., 516.)

(4) Lastly, the petition urges that the judge of the Criminal Court refused a request to find the facts upon a preliminary plea in bar because not made till after three counsel had spoken on the merits. That simply raises the question discussed in the previous opinion as to the allegation that evidence of testimony taken in the supplemen-

tary proceedings was used against the defendants. The Judge, on this plea, held that it had not been, and all through the trial, at every turn, rejected all evidence of what transpired in the supplementary proceedings. The former, or quashed indictment, was only introduced in reply to the plea that the present indictment was barred by the statute of limitations.

The former opinion of the Court is affirmed, and this will be certified to the Superior Court of Edgecombe County.

Motion denied.

No. 41.

STATE
v.
MALLETT. } FROM EDGECOMBE.

DOUGLAS, J., dissenting: The late hour at which I have received the opinion of the Court on the petition for re-argument, and the difficulty of examining two hundred and eighty-two pages of unprinted record, make it impossible for me to do justice to this case in any opinion that I may write; but I am so firmly satisfied that these defendants have not had a fair trial in the Criminal Court, that I must at least enter my earnest dissent. This case was appealed by the defendants to the Superior Court, where they were granted a new trial by Judge Hoke in the following judgment: "This cause coming on to be heard before Hoke, Judge Superior Court, holding said term, on appeal of defendants from a verdict and judgment had against them in the Criminal Court of said county, the Court is of opinion that there was substantial error committed on trial of cause against defendants therein, for that, *among other reasons*, the facts developed on examination of defendants

in proceedings supplemental to execution were, over their objections, used to effect their conviction. Both directly in evidence has Dr. Baker and Mr. Henry Gilliam—and indirectly by placing before this jury the evidence of these defendants brought out by cross-examination before S. S. Nash, Referee, in which examination defendants were asked concerning same matters developed in said supplementary proceedings. It is true the case on appeal states that the Judge held, and so declared, that statements made by defendants in said supplementary proceedings were not competent evidence against defendants on this trial, but it is *perfectly patent* on inspection of the evidence set out that the facts brought out on examination of defendants in said supplemental proceedings were necessarily used to develop their evidence before Nash, Referee, and both in this and in other particulars directly was this examination in supplemental proceedings used to effect their conviction contrary to statute." * * * The fact that was "perfectly patent" to the able and learned Judge who granted the new trial, is equally so to me. I can notice only a few of the other errors appearing in the record.

It appears that the prosecuting witness, Baker, and his attorney, were present at the examination of the defendants under supplementary proceedings, and conducted the examination, went before the Grand Jury as witnesses on the bill of indictment, and were witnesses on the trial. Baker, on cross-examination, was asked the question: "Did you carry with you before the Grand Jury, when you testified there in this bill of indictment, the evidence taken in the supplementary proceedings." This question was clearly competent and material as impeaching evidence, and yet was excluded on objection by the State. In this I think there was substantial error.

Again, the prosecutor, Baker, while testifying as a witness, was permitted to introduce what he said were the

day-book and ledger of the defendants, to explain the character of the books, to read from them, and to comment on them. Can this be permitted, especially when the witness testified that his first knowledge of the book was received at the supplementary proceedings examination before the Clerk. I think this is error.

Again, the first bill of indictment that had been quashed was introduced in evidence by the State on the general issue, over the objection of the defendants. In this I think there was error.

Again, the defendants offered four witnesses to show what was testified to before the Grand Jury. This was clearly competent and material, as tending to show the animus of the witnesses. I think it should have been admitted under the authority of *State* v. *Broughton*, 29 N. C., 96, a very instructive opinion by Chief Justice Ruffin.

Again, the State was permitted to introduce the register of a hotel at Kelford to show that H. T. Latham had registered his name as H. T. Thomas. Latham was not on trial, and yet this register was introduced as substantive evidence against the defendants, who had no connection with it whatsoever, on the ground that "there were *prima facie* grounds for believing in the existence of the conspiracy." I do not clearly understand what that means; but can we say that under a general plea of not guilty, evidence is admissible upon the sole ground that there are *prima facie* grounds for believing the defendants to be guilty? If it does not mean this, what does it mean? The conspiracy was the sole offense charged, and can that be *assumed as proved* before verdict? Again, upon the motion to quash, or the plea in abatement, or even upon the trial, why could not the defendants introduce members of the Grand Jury to show what the witnesses, Baker and Gilliam, had testified before them? *State* v. *Broughton*, *supra*.

Other errors appear to exist, but I have no time fo elaboration. That a new trial should be granted as a ma ter of justice is clear to me. I do not see why this Cou can not pass upon all the exceptions appearing in th record before us. It is practically the record of the Crim inal Court, with the addition of the judgment of the Su perior Court and the exceptions of the State. Every ex ception of the defendants is before us as fully as before th Judge of the Superior Court, and in the same exact words I do not see the necessity for the adoption of an arbitrar rule that only complicates the system of appeals, adds t the labors and costs of both appellants and appellees, an may in some cases, as in the present, work a substantia injustice. What good can it accomplish to counterbalanc these evils? The Legislature originally provided for ap peals directly to this Court, which would have avoided th difficulties now before us; but we held that provision un constitutional in *Rhyne* v. *Lipscombe*, 122 N. C., 650. think that we should now, as far as we have the powe simplify appeals so as to bring all causes to a final dete mination with as little cost, trouble and delay as is con sistent with the proper administration of justice.

SUPPLEMENTAL PROCEEDINGS BEFORE ED. PEN NINGTON, ESQ., CLERK SUPERIOR COURT, O FRIDAY, DECEMBER 20, 1895.

Julian M. Baker and Ida M. Adams, Administrators,
against
J. P. Mallett and C. B. Mehegan, trading as Mallett & Mehegan.

APPEARANCES.

For the plaintiffs—Messrs. Gilliam & Gilliam, and J. H Blount.

For the defendants—Messrs. J. J. Martin and G. M. T. Fountain.

Defendants move the Court to dismiss the proceedings, for that the affidavit is not sufficient to justify an order of examination: (1) It does not show that plaintiffs have not acquired a lien on real estate or personal property sufficient to pay the debt for which said judgment was rendered, or to pay said judgment. (2). Whether they have obtained any lien on either real or personal property which has not been sold under said execution.

Plaintiffs are allowed to amend the affidavit and insert this, and it is done accordingly.

C. B. MEHEGAN, sworn and examined for the plaintiffs, testified.

Direct examination, by Mr. Blount:

Q. Do you know whether a copy of the evidence in the trial before Thos. H. Battle, Esq., Referee, on or about July 27, 1895, has ever been in the possession of your attorney? A. I had possession of it.

Q. What did you do with it? A. I don't know what I did with it last, but I gave it to Mr. Moore. My recollection is that I was at Mr. Martin's office at the time. Mr. Martin had it and Mr. Fountain had it at his office. This was after I gave it to Mr. Moore. The last time I saw it was at Mr. Fountain's office. Mr. Fountain was not present at the time.

Q Have you had any information from Mr. Moore as to whether he had it? A. No, sir; I have not written to him about it. I told Mr. Pender that I thought Mr. Moore had it. Mr. Fountain and Mr. Martin instructed me not to let Mr. Pender have it.

Q. Where was it at that time? A. I think Mr. Moore had it then. Mr. Martin did not tell me where it was.

Q. Did he tell you why he did not want you to produce?

A. I told him Mr. Pender wanted it, and what he wanted with it, and Mr. Martin told me not to let him have it.

J. P. MALLETT, sworn and examined for the plaintiffs, testified.

Direct examination, by Mr. Blount:

Q. How old are you? A. 41 years old in January, 1896.

Q. How long have you resided in the county of Edgecombe? A. About twenty-two years.

Q. Where was your native home? A. I was born in Washington County, near Plymouth.

Q. Are you a married man? A. Yes, sir.

Q. When were you married? A. October 24, 1883 or 1884.

Q. Who did you marry? A. Miss Siddie Mehegan.

Q. Sister of the defendant, Mehegan? A. Yes, sir.

Q. At the time you married her, was she a lady of any property? A. I can't say.

Q. Did you not know that she had property? A. No, sir.

Q. What did she have immediately after you married her? A. Don't know.

Q. Did she have any land? A. She might have had an interest in some land.

Q. What land did she have an interest in? A. Property here in town.

Q. What property? A. Property belonging to the Mehegan estate.

Q. Has she ever gotten it? A. I don't know; she has been living there on it.

Q. Who is the title in? A. I don't know.

Q. Does she rent the place? A. She manages the house affairs.

Q. Does she rent it? A. She rents it from her mother and boards her for the rent.

Q. How long has she been doing this? A. Ever since we were married.

Q. What does it consist of? A. The house and lot in town.

Q Then it belongs to her mother? A. It belongs to the Mehegan heirs.

Q. You suppose she will be an heir when her mother dies? A. Yes.

Q. When you first married did you go to keeping house? A. No, sir; we lived there.

Q. What personal property did she have in her possession when you married her? A. Household furniture; two or three sets of furniture.

Q. Who bought that property? A. She had some of it before we were married; I think she had two sets.

Q. Who bought the balance? A. I bought one set the day before I was married and sent it around to her before we were married.

(Defendants' counsel objects to the evidence. Plaintiffs' counsel states that he expects to develop that, at the last term of this court, a judgment was taken against these defendants for about $6,000; that immediately they went to work, in a systematic way, to defeat this judgment, and placed the wife of the defendant, Mallett, in the mercantile business in this town; for some fraudulent purpose, some bank stock has been put in the name of his wife. We expect to show that J. P. Mallett listed for taxation and swore it was his property, some of the furniture in this house. That she [is] a poor woman and had no opportunity to make money, and to show further that this property was put in her name for a fraudulent purpose.)

The Court tells counsel to proceed with the examination.

Q. You say you sent her one set just [before] you got married? A. Yes, sir.

Q. Do you remember what you gave for it? A. I think it was fifty dollars, or more.

Q. If she had furniture, why did you buy furniture to send around there; you occupied only one room? A. Because she wanted it.

Q. Is that set of furniture you bought in the house now? A. I think it is, or part of it; I think the bed, bedstead, washstand and bureau are there.

Q. Is the property you have mentioned all the property she had when you married her? A. I don't know.

Q. What business has she been engaged in since your marriage, in 1883 or 1884? A. She has been manager at home and charged board, paid the taxes and insurance on the place; then she has received board from my family, C. B. Mehegan and the clerks, and then the board of the servants employed at the store. We generally had a driver, and sometimes two, and one clerk.

Q. Is that the only business she has been in since you were married? A. Well, she made some money by selling yeast.

Q. Do you think she accumulated any money out of the yeast business? A. She might.

Q. Did you ever apply to the Bank of Tarboro to purchase some stock? A. No, sir; and none was ever issued to me.

Q. When was the stock issued to your wife taken out? A. I don't know; I have no idea.

Q. Was it this year or last? A. Don't know; I don't know the date.

Q. You don't know what year it was? A. I am not certain.

Q. What is your best judgment about it? A. I don't know, whether it was the latter part of last year or the first of this year.

Q. Don't you know that it was since this suit was brought? A. Yes, sir.

Q. Since March, 1894, then, was it? A. I don't know.

Q. Do I understand you to say that you don't know whether it was before March, 1894, or not? A. I can't say.

Q Was it not bought after this suit was brought? A. I can't say; I think she bought it either in 1894 or 1895.

Q Did she not purchase it after this suit was brought? A. She bought it in 1894 or 1895.

Q. I will ask you again: Do you not know that she bought it after this suit was brought: do you mean to swear that you do not know whether this stock was bought before or after this suit was brought? A. It was bought in 1894 or 1895.

Q. I will ask you again: Do you not know that your wife bought this stock after this suit was brought? A. She bought in 1894 or 1895.

Q. Do I understand you to say that you don't know whether this stock was bought after the suit was brought? A. I don't know.

Q. When was the Bank of Tarboro organized? A. I don't know whether it was organized in 1894 or 1895.

Q. Does not the cashier board with you? A. He does with my wife, at the same house.

Q. Do you know what time the bank began business? A. I think it was in 1895.

Q. Don't you know that your wife bought after the bank began business? A It may be that she did; I don't know whether she did or not.

Q. Did she consult you about it? A. She did not consult me particularly about it.

Q. Did she talk to you about it? A. She told me she was going to buy it. I think it was after the bank began.

Q. Why is it that you insist that you don't know

whether she bought the stock after the bank went in business? A. I don't know when she bought it.

Q. Where did your wife get the money with which she bought the stock? A. She owned some shares in the Building and Loan Association in Tarboro. She got that money and invested it. Afterwards she told me she had bought the bank stock.

Q. How much money did she get out of the Building and Loan Association? A. I think it was three hundred dollars or more; it was in her name.

Q. Did she make that much on the investment or did she owe the Association? A. She owed them nothing.

Q. How much did she pay for the stock? A. I don't know: I think she has paid $400.

Q. Where did she get the other $100? A. She drew $325 from the Association and I gave her, made her a present of, $75 or $80.

Q. Who paid the Association weekly dues? A. It was paid out of the store by myself or by Latham and charged up to her.

Q. When was this stock taken out? A. I can't recollect; I think it was in 1892 or 1893.

Q. You say you gave her the $75 or $80 out of the store? A. No, sir; I gave it out of my pocket.

Q. Were you in any other business? A. No, sir.

Q. What business is your wife in now? A. In the same business she has been in all the time; she manages the home affairs as she has always done; she is merchandising.

Q. Is she not occupying the same store Mallett & Mehegan occupied? A. Yes, sir.

Q. When did she go into business? A. I think it was about the 16th or 20th of November.

Q. Did she go into business after the attachment in this case was sued against you and Mehegan? A. Yes, sir.

Q. Where did she get the stock of goods that she placed

n the store after she went into business? A. They were a part of our exemptions.

Q. Did you and Mehegan put your exemptions in the business for her? A. No, sir; we sold them to her.

Q. For how much? A. She gave me $100 for what we claimed was the true value of the goods, and a note for the balance. I think the note is $200.

Q. Where did she get the $100 from that she paid you? A. Don't know; she paid me the money.

Q. Where was she when she paid it? A. At home.

Q. You don't know where she got it? A. No, sir.

Q. Was anyone present when she paid you? A. I don't know whether Latham was present or not.

Q. Did you ask her where she got the money? A. No, sir.

Q. Have you ever asked her? A. No, sir.

Q. How much did she pay Mehegan? A. I can't say.

Q. Were you present? A. No, sir.

Q. Did you ever hear Mehegan say? A I heard him say he got $100 and she gave him a note.

Q. Have you ever heard Mehegan say how much the amount of your wife's note to him was? A. I don't recollect.

Q. Did your wife ever tell you? A. I don't recollect.

Q. Where did she get that money from? A. I can't say.

Q. Did she not get it from you and Mehegan? A. We paid her some money in 1894 or 1895; the books will show.

Q. What did you mean by saying just now that you did not know where she got it from? A. I did not know the particular place she got it from about the house.

Q. What did you do with the $100 your wife paid you? A. I think I paid that out.

Q. To whom; who did you let have it; did you give it back to your wife to buy goods? A. No, sir.

Q. What did you do with it? A. I deposited it with a certain party as a collateral for a bond in one of these cases; we tendered it to the Clerk.

Q. Did you and Mehegan, or either of you, advise your wife to go into the mercantile business? A. I had a talk with her about it.

Q. Did you advise her to do it? A. She advised me to do it.

Q. Was it the purpose of you and your partner and your wife, in putting this business into her name, to avoid paying this judgment? A. No, sir.

Q. Then why was this done immediately after this execution was issued against [you] and your partner? A. I can't say.

Q. After this execution was issued against you and your partner, is it not a fact that you and your partner and your wife consulted about it, and you three concurred in going into business there?

(Objection by defendants. Objection overruled. Exception.)

A. After we got our exemptions we made an estimate of their true value; we opened the store, and after we found that we only had about 300 and some odd dollars at the true value for me, and he had $119 in money and some accounts (I have forgotten how much they amounted to) my wife had some money and she tendered it to us, and we declined to take it and run the business in the name of Mallett & Mehegan, but offered to sell her our exemptions, which she bought.

Q. After this execution was issued, is it not a fact that you and your partner and your wife agreed that she should go into business as a free-trader? A. No, sir; my answer is the statement just made.

Q. How much money did your wife tender to you and your partner? A. The $100 apiece that she has paid, and

she said that she had more that we could get if we wanted it.

Q. How much more did she say that she had? A. I don't recollect any particular amount.

Q. Where did she get it? A. I can't say where she got it.

Q. Have you any idea where your wife got that money? A. Yes, sir; that money was paid her, part of it by Mallett & Mehegan for board and money due her for board.

Q. When did you pay this money for board? A. Since we were married—we have had a running account.

Q. And this is money you and Mehegan had paid all along for board? A. I paid it all.

Q. Did you pay it in a lump? A. No, sir; the books will show when it was paid.

Q. Then it was money paid her for board from time to time? A. Part of it.

Q. Where did she get the money to run the house? A. She traded with us.

Q. Do you know how much she had when she made you this tender or offer? A. No, sir; I think she had $500 or $600.

Q. Had she kept any bank account in town? A. Yes, sir.

Q. Prior to the bringing of this suit? A. I don't know.

Q. Do I understand you to say that this money was from board? A. Part of it.

Q. Have you directly or indirectly loaned your wife any money; have you let her, or has your partner let her have any money? A. The books will show that we let [her] have $800 or $1,000. It was paid this year and last year—1894 and 1895.

Q. Did not your wife buy a carriage and horses from you? A. No, sir.

Q. Did you not have one? A. I had a horse. The car-

riage was hers She bought it from Hussey and paid for it.

Q. Did she make the bargain? A. Yes, sir.

Q. You say your wife made this money keeping house and boarding you and your partner and two or three servants? A. Yes, sir.

Q. Do I understand you to say that she made this over and above the expense of keeping house? A. Yes, sir.

Q. Do you know how much money she has invested in the present business she is in? A. No, sir.

Q. Have you any idea how much money your wife has expended in the purchase of goods since she has been in this business?

(Objection. Overruled. Exception.)

A. No, sir; not exactly.

Q. Have you heard Mr. Mehegan say?

(Objection. Sustained. Exception.)

Q. Are you the agent of your wife; has she employed you in this business? A. Yes, sir.

Q. How much does she pay you? A. No stated amount.

Q. What was the contract between you? A. No stated contract.

Q How did she hire you? A. She appointed me her agent; C. B. Mehegan and I are her attorneys to conduct the business of S. Mallett—the mercantile business

Q. When did she make you her agents and attorneys? A. I think it was about the 16th or 20th of November

Q. As agents of S. Mallett, have you or your partner purchased any goods for her? A. I have purchased some; I can't say how many.

Q. Did you pay cash for them? A. For some of them I did.

Q. When did you buy them? A. From day to day.

(All these questions are objected to by the defendants, on the ground that the parties have no interest.)

Q. Where did you purchase these goods? A. All the

purchases I made were in town; some from Royster & Co and some from D. Lichtenstein & Co.

Q. Is that all? A. All except produce at the door and one bill of twelve or fifteen dollars in Philadelphia.

Q. How much was your bill with Royster & Co.? A. Can't say.

Q. Cash or credit? A. Sometimes it was cash and sometimes not. I have not paid them up.

Q. As much as $100? A. Yes, sir; can't say it was $200; can't say how much from Lichtenstein & Co.

Q. Did your wife instruct you to buy these goods? A. She appointed me her agent.

Q. Where did you get the money? A. Out of the store.

Q. How much money did she put in the business? A. Can't say.

Q. You don't know? A. I have gotten some money from her from time to time.

Q. Since this execution was issued, have either you or your partner let your wife have any money? A. No, sir; except what we owed her; we are still indebted to her.

Q. Have you paid her any board since this execution was issued? A. I think I have paid her about sixty dollars; it may have been more.

Q. Have you let her have any money besides this since this execution was issued; since the attachment was sued out? A. I have paid her some since then, but can't say how much—fifty dollars or more.

Q. Do you know anything about the goods H. T. Latham bought at the auction sale by the sheriff? A. I did not attend the sale.

Q. What did he do with the goods? A. Some of them are in the store separate from our goods.

Q. They are kept there for sale by him; is he a clerk there? A. Yes, sir; I can say that J. P. Mallett has nothing in that store, either in goods or money.

Q. Have you anything anywhere else, any property or money in the possession of anybody else? A. No, sir; except my personal property exemptions.

Q. Did you ever see the statement made by your firm on January 1, 1894? A. I recollect seeing one statement, but I did not go over it; it was made by Mr. Mehegan

Q. Please state if there was any difference in the expenses of running your store after January 1, 1894, and were your expenses greater than before? A. No, sir; we might have owed money that had not been paid.

Q. Were you present at the referee trial before Mr. Thos. H. Battle? A. Yes, sir.

Q. Did you hear the statement made by C. B. Mehegan that at that time your business was in a prosperous condition? A. I don't recollect.

Q. Is it a fact that your business was, at that time, in a good and prosperous condition? A. I don't know; our debts were not paid; we owed some money.

Q. Have you any account of the money owed at that time? A. No, sir.

Q. Were you present at the examination, and did you hear C B. Mehegan state that the business was in good condition, and that he could easily pay this claim against you? A. No, sir; I did not hear it.

Q. Were you present when the $4,400 was counted out by Mr. A. P. Hyman? A. Yes, sir; I don't know whether this was in the statement; don't know the amount of the stock.

Q. Where did the $4,400 come from? A. Proceeds of the sale of goods and collection of accounts; we had that much money on hand.

Q. That was your money at the time? A. It was supposed to be our money, but we owed debts that were not paid.

Q. Did you swear to that statement of January 1, 1894?

A. I recollect signing a statement, but whether that was the statement or not I don't recollect.

Q. Do you know what you placed your property at? A. No, sir.

Q. Don't you remember it was $17,000? A. I don't remember.

Q. At the time this statement was served, how much money did Mallett & Mehegan have? A. I can't tell.

Q. As much as $1,000? A. I can't say.

Q. Why don't you know? A. We had a cash book; when it gave out just we kept a memorandum in the drawer.

Q. When did the book give out? A. March, 1895.

Q. How much cash did you have at that time? A. $1,700

Q. Where is the memorandum you kept after that? A. I don't know; those books were in the store. We had a small book in the drawer, but I don't know where it is.

Q. At the time the attachment was served, did you or the firm have any cash in the possession of anybody else? A. No, sir.

Q. Did you have any cash except what was in the safe? A. No, sir.

Q. The firm had no money at all? A. No, sir.

Q. Had they placed any money in anybody else's hands? A. No, sir. We might have had some money in the bank; we had no special deposit.

Q. What became of the $4,400 on hand January 1, 1894? A. After we failed to make any settlement with Gilliam & Son, we carried our business right on, paying our debts and accounts, both against the firm and against us as individuals.

Q. Have you got the book showing the payment of that money on bills? A. No, sir; we had a book. I don't

[know] where it is. All the books and papers were take possession of by the sheriff.

Q. Don't you remember that, in the statement of Jan uary 1, 1894, you and your partners stated that you onl owed $2,000 and that the firm was worth $17,000? A. don't recollect.

Q. Do you deny that it was in there? A. I don't know whether it was in there or not. Mr. Mehegan made i out.

Q. Please turn to your book, under date of October 4 1895, relative to the transaction between your firm and E. T. Robinson, by which you sold him $185. A. I hav no book of that date; I don't remember the transaction I collected no money on account of any sale to him.

Q. Do you own any Building and Loan stock? A. Yes sir; ten shares.

Q. Do you know how much they lack of being paid up A. It has been running two or three years; it is mortgaged

Q. What is the stock worth over the mortgage? A. I would not be worth a cent if credited on the mortgage the property would be worth something.

Q. What is the stock worth? A. I don't know; I bor rowed $1,000 from the Association and improved the property; in October six shares of the ten matured. I went to Mr. Curtis and demanded the return of my cer tificate of the six shares or a credit on the note for $600. Mr. Curtis said he would have to see about it.

Q. Had your wife's stock matured when she drew out the $300? A. No, sir; the property that I had I owned before my marriage. After I was married I told my wife that I would let her have all the income from that property, which I paid over to her from time to time. It was $7 per month at first. After I borrowed the money and im proved the property I collected $20 per month. After wards I got a little negligent about paying it to her and

did not turn it over as I ought to have done, and so I took some Building and Loan stock and kept it up for her, and I have been keeping it up up to the time they began talking about the organization of this bank, and she said she wanted to invest in the bank because her brother had very good chances of being cashier. I told her she could draw it out if she wanted to, and she did so. This was separate from the ten shares owned by J. P. Mallett. She drew out between $320 and $325, and I gave her between $70 and $80, which she told me afterwards she invested in the bank

Q. Why did you not make this statement about it this morning? A. Because I didn't understand the question.

Q. So you were paying your wife rent on your own property? A. That is my statement.

Q. Do you know anything of the following sales of goods: October 4, E. T. Robinson, Robersonville, $185; October 3, Orren James, town, $33.19; T. H. Parker, Rocky Mount, $148.77; October 7, S. W. Bell, Kelford, $168.51; October 9, W. H. Owens, Williamston, $150, September 27, H. H. Ward, Rocky Mount, $52.83; October 4, Orren James, $32.79? A. I know nothing about these sales; the entries are not in my handwriting; I know nothing of the transactions.

Q. Do you know whether any of those items have been collected? A. I do not.

Q. Is your wife well? A. No, sir; she is not in bed; she has a physician attending her.

Q. How long has the physician been attending her? A. Since day before yesterday. I have been to the physician and consulted him. I have not consulted him as to whether she was able to come to this trial.

Q. What did you estimate your stock of goods at about the time it was attached? A. I judged roughly that there was between four and six thousand dollars.

Q. Had you bought any goods for several months tha amounted to anything much? A. I bought goods as needed them.

Q. Was not your stock pretty well run down? A. W had a good stock of heavy goods, tobacco, etc. The trad did not justify the keeping of much of a stock.

Q. Can you look at your books and inform me of th amount of purchases you made January 1, 1894, to Jan uary 1 1895? A. No, sir; I have no books showing it We had a book we kept our Northern accounts on, but don't know where it is; I don't know what became of it Our books and papers were in the store when the sheri took possession.

Q. Have any payments been made on the following amounts since the attachment: J. A. Warren, $149.61 A. He has a contra account before the attachment.

Q. B. F. Dawson, $294 50? A. It is not paid; he dis putes it.

CROSS-EXAMINATION.

By Mr. Fountain:

Q. I understand you to say that you have no interest in the stock of goods or moneys, or any other thing of value in the possession of S. Mallett, where Mallett & Mehegan carried on business before this execution? A. That is true. I have not one dollar's worth of interest in money, goods or anything of value in the possession of S. Mallett. I am acting only as her attorney and agent, with the assistance of C. B. Mehegan, to conduct her business.

Q. You stated that you owned certain real property before you were married; when were you married? A. October 24, 1883 or 1884.

Q. At that time you made your wife a present of the rents accruing from that real estate, and settled with her as the rents were collected? A. Yes, sir.

Q. When did you go into business with C. B. Mehegan? A. I think it was about the 25th of January, 1889 or 1890; 1890 I think.

Q. You married Miss Siddie Mehegan? A. Yes, sir.

Q. Your wife had been a school teacher before you married her? A. Yes, sir; she had been teaching two or three years.

Q. She was also keeping boarding-house? A. Yes, sir.

Q. Do you know any boarders she had at that time? A. I have seen W. R. Ricks and his family there boarding, J. A. Warren, B. F. Dawson and his wife, and I think one or two clerks, but I am not sure about it. C. G. Bradley and wife boarded there after I was married.

Q. The property belonged to your wife's father? A I have been told so. He was dead. I don't know whether or not he left a will.

Q. Did Mallett & Mehegan turn over to Mrs. Mallett one dollar except what they justly owed her? A. No, sir; we owe her yet for a part of the board.

Q. You were asked about the statement made just before or after this suit was instituted; you were represented by counsel before Mr. T. H. Battle, the referee? A. Yes, sir; by Judge Connor and Mr. John L. Bridgers.

Q. At the time that suit was pending, this payment about which you were asked, was made then? A. About July 1 we concluded that we owed a balance for the board of myself, Mr. Mehegan and Mr. H. T. Latham, and we paid it.

Q. Did you consult your counsel about it? A. Yes, sir; he told me I had a right to pay any just debt I owed and to pay her, and, in consequence of this, I paid her. I paid her another account she rendered me for the board of the driver at the store; it was a just account. Sometimes we had more than one driver.

Q. When you quit business as an individual, you did

not owe anybody anything more than you were able to pay? A. No, sir. When I quit business as J. P. Mallett I owed nothing but what I could pay. I had a lot of balances on my ledger and some few notes that I considered no good

Q. Now, right there: did you present any of those notes or accounts to your wife? A. I told her, when we were talking about going into business with C. B. Mehegan, that I would make her a present of them, and if I ever collected any of them I would give it to her. She collected one note against O. Burnett, and I had an account of $350 against Owen Jones, and I think she collected $200 or over on that. Then there were several small accounts that she collected afterwards. Some of them are still uncollected and are still her property. I had one note against a man named Johnson that was worthless. I have lost this note. I gave her that also.

Q. Do you remember the amount or value of your personal property exemptions as assigned to you by the assessors under the execution in this action, as made out by yourselves? A. I think it was about $360 or $370, somewhere in that neighborhood. The list shown me a memorandum of my exemptions and is the property of Mrs. S. Mallett.

Q. You said this morning that, just before you were married, you bought a set of furniture and made your wife a present of it? A. Yes, sir: that is all the furniture I ever bought that is in the house. She bought all that is there. Mrs. Mehegan has some there.

RE-DIRECT EXAMINATION.

By Mr. Blount:

Q. Did your wife ever list this property? A. No, sir; I listed it under the head of "property belonging to wife or minor child."

Q. Did you not swear that this was your property before the list-taker? A. I don't know; but did not think it would make any difference so the taxes were paid.

C. B. MEHEGAN, sworn and examined by defendants, testified.

By Mr. Fountain:

Q. Look at these papers (shown above copies); where did you get those papers? A. Mrs. Mallett gave them to me.

Q. When? A. She showed them to me yesterday afternoon, about dark

CROSS-EXAMINATION.

By Mr. Blount:

Q. Suppose three copies like these were made on a typewriter at the same [time], could [you] distinguish them? A. I could tell which were the carbon copies; when many copies are made the last are less distinct.

Q. Can you tell if this is the first or second? A. I can not; this is the paper she gave me.

Q. How do you know? A. Because the others are signed by the Clerk.

Q. You were not there when the sheriff was there? A. No, sir; I only know what Mrs. Mallett told me.

C. B. MEHEGAN, recalled by the plaintiffs, testified.

Q. When did Mrs. Mallett go into business?

(Objection by defendants, unless it is stated which branch of the case is to be heard—whether in regard to Mrs. Mallett or in regard to Mallett & Mehegan; that, if the plaintiffs are proceeding against Mrs. Mallett, they will object to any question relating to Mallett & Mehegan; and if in regard to Mallett & Mehegan, then they will

object to any question relating to Mrs. Mallett. Objection overruled.)

A. To the best of my recollection, November 16, 1895.

Q. What store did she go into business in? A. In the store formerly occupied by Mallett & Mehegan, owned by Mrs. Farrar.

Q. When did the firm of Mallett & Mehegan go out of business? A. When they sold to Mrs. S. Mallett.

Q. Have you recently made purchases for the business of S. Mallett? A. Yes, sir.

Q. Can you give us the sum of those purchases when you went North? A. When I went North I bought, I suppose, about $450 or $500.

Q. How much money did you take with you? A. $70.

Q. Did you receive any money after you left this place? A. Yes, sir; five checks of $100 each.

Q. Who sent them to you? A. J. P. Mallett, as attorney for Mrs. S. Mallett; they were drawn by the Cashier of the Bank of Tarboro to the order of S. Mallett and indorsed; they were drawn on some bank in New York.

Q. Did you get the checks cashed? A. They were used in this way: A part of the goods I bought were cash and a part on credit; I don't remember the name of the bank on which the checks were drawn.

Q. You read the checks? A. Yes. At the time I was in New York my mail was delayed two days. I stayed there only four days; and, on account of the limited time, I transacted my business very hurriedly.

Q. Did you show the checks to anybody? A. I paid them to the parties I bought goods from.

Q. Name some of the parties. A. I bought some goods from E. Greenfields & Co., 44 Barclay street, $88.06, dated December 14, 1895, No. 1.

Q. What member of the firm did you negotiate with? A. My impression is that I talked only with the salesman.

Q. And with what other firms did you negotiate those checks? A. They were not only in New York; some were in Philadelphia and Baltimore. The goods I bought from Greenfields are now in the express office. The instructions I gave to the parties were to ship by the Atlantic Coast Line Dispatch. By mistake they have shipped them by Adams' Express, and the charges are a little over sixteen dollars.

Q. Let us see the bill. (Shows it, and it is numbered No. 1.)

Q. Did this firm ask you anything about the standing of S. Mallett? A. No, sir; I never had any transaction with them before. I told them I wanted the goods at the very lowest cash prices, and would pay cash for them.

Q. This is a correct statement of the goods you bought from that firm? A. Yes, sir.

Q. And they are in the express office? A. I think they are; there are some goods there, and I can not imagine what they are unless it is this bill.

Q. Why did you not take them? A. Because S. Mallett is restrained from doing anything with goods in transitu.

Q. What day did you purchase these goods? A. The order was given on Friday, December 13. I paid for them the next day as attorney for S. Mallett.

Q. Are these all the goods you bought in New York? A. No, sir.

Q. Give us any other invoices you have. A. No. 2, dated December 14; Carhart & Bro., 49 and 51 Park Place; $12.97. These goods are in the store and not paid for.

Q. Which one of the firm did you negotiate this business with? A. My impression is that I negotiated it with

Henry Carhart; he is a young man, and I don't know whether he is a member of the firm or not.

Q. What statement did you give this firm as to your financial condition, or the financial condition of S. Mallett? A. I don't think I gave them any statement.

Q. Did Mallett & Mehegan deal with them before? A. Yes, sir.

Q. Did you give them any statement as to why Mallett & Mehegan went out of business and S. Mallett went into business? A. Yes, sir; I bought that bill of goods from their salesman here for S. Mallett. Those goods are here and not paid for.

Q. Did you state to them, or their salesman, in substance, that this judgment existed against you, and that you did not intend to pay it? A. No, sir; I stated to them that, on account of some legal trouble, Mallett & Mehegan had become involved and forced to go out of business.

Q. Did you state to the firm of Carhart & Bro. that it was the purpose of Mallett & Mehegan in going out of business, and S. Mallett going into business, to avoid paying this judgment?

(Objection.)

A. No, sir; I did not.

Q. The bill of J. D. Nordlinger, 185 Franklin street, N. Y., dated December 16, $19 43; where are those goods? A. They are in transitu; don't know where they are; at the depot, I suppose; they are not paid for. The restraining order says that S. Mallett shall not interfere with them in any way, and, therefore, I don't move them. This bill is No. 3.

Q. Any other purchases made in New York? A. Yes, sir; No. 4; dated December 16; C. B. Rouss, 549 Broadway; $101.41. These goods are not paid for.

Q. Did the firm of Mallett & Mehegan deal with this firm before? A. I think they had in a small way.

Q. What statement did you make to C. B. Rouss as to why Mallett & Mehegan went out of business, and S. Mallett went into business? A. None at all; none was asked for. I think those goods are in the store; they were there before the restraining order was served.

Q. Any other purchases made in New York? A. Yes, sir; No. 5; C. B. Rouss, $12.10; dated December 18. These were bought at the same time as the other bill.

Q. What member of the firm did you deal with? A. I did not deal with a member of the firm; I dealt with the salesman; there are different departments and different salesmen. I suppose these goods are at the depot. They are not paid for. No. 6; dated December 14, for $23.03; Detwiller & Street, 172 Fulton street. These goods are paid for and I think they are in the store.

Q. Did you ever deal with this firm in the name of Mallett & Mehegan? A. No, sir.

Q. Did you make any statement to them as to why Mallett & Mehegan went out of business and S. Mallett went into business? A. I did not.

Q. Did you make any statement as to the financial condition of S. Mallett? A. No, sir; I told them I wanted to pay cash and wanted the lowest cash prices.

Q. Did you pay by checks or money? A. Bill No. 1 was paid for in one of the checks; No. 6 paid for with currency—part of the money I carried with me. I think these bills named are the only purchases while in New York.

Q. State if you have made any other purchases in New York on account of S. Mallett? A. I have. No. 7, Carhart Bros., $171.66; dated November 23.

Q. Who ordered this bill? A. I bought these goods as attorney for S. Mallett from Mr. James Mason, who is the salesman in this territory.

Q. I see this bill is dated November 23; does that re-

fresh your memory as to the transaction? A. It was bought before that, I suppose four or five days.

Q. Did you pay the cash? A. I did not; they are not paid for now.

Q. Did you buy them before or after S. Mallett went into business? A. After she went into business and after she was made a free trader. I showed the salesman the registration of the paper where she became a free trader, and at the same time I showed him the power of attorney which S. Mallett had given J. P. Mallett and C. B. Mehegan to transact business for her.

Q. Did you say, in substance, to this salesman, that it was the purpose of Mallett & Mehegan in going out of business, and of S. Mallett going into business, to avoid the payment of this judgment? A. No, sir; I made some statement to him that, in substance, was that on account of the legal entanglements we had gotten into, and the reports coming from Dr. Baker, that it was impossible for Mallett & Mehegan to do business, and that we had sold out to S. Mallett, absolutely, and that she was responsible for the bills made.

Q. What statement did you make to him as to whether she was capable of paying these bills? A. None at all.

Q. Are you certain of it? A. Yes, sir.

Q. Did you give him any personal assurance that these bills would be paid? A. No, sir; I did not. I don't think Mallett had anything to do with it. Bill No. 7 is in the store; No. 8 is a bill of Francis H. Leggett, dated December 14, for $18.31. This bill was ordered by mail. I don't remember whether they have been paid for; I think I have remitted as attorney some $20 or $30 on it. I bought bill No. 9 from them, dated November 26, for $16.80; No. 10, same date, for $4.94. My impression is that on No. 8, No. 9 and No. 10 that I have remitted checks for $20 and $15, on the Bank of Tarboro. No. 7, dated Decem-

ber 11, bought of same firm, for $106. This is not paid; none of it paid. It was purchased before December 7.

Q. When did you give this order? A. My impression is that I gave Mr. Hamlin, the salesman, that order on the day of the hanging here.

Q. Did you make a statement to him, in substance, that the reason that Mallett & Mehegan had gone out of business and S. Mallett had gone into business, was to avoid the payment of this judgment? A. I did not, that I recollect of.

Q. What reason did you give him? A. I don't recollect; my idea is that I made the same explanation to him as to Mason; he did not want to listen to an explanation, but wanted to sell me the goods. No. 12, Stephen Underhill, dated November 23, for $23.59, less a tub of butter returned, leaving a balance of $11.39. No. 12, dated November 23, was ordered through the mail by me as attorney for S. Mallett. My impression is that this bill is paid for. I think the goods have been sold with the exception of a little of the cheese and some little of the butter sent to replace that returned.

Q. Had you dealt with this firm before? A. Mallett & Mehegan had, and I had dealt with them when I was with Mr. Woolard.

Q. Did you make any explanation to them by letter or otherwise why Mallett & Mehegan went out of business and S. Mallett went into business? A. I did not. No. 13, dated December 2, Stephen Underhill, for $12.13. My recollection is that that bill of goods was shipped direct to the Martin Lumber Company, and the invoice sent here to S. Mallett. They were shipped from New York to Everett's Station. The Superintendent met me on Pender's corner one day and asked me if I had any butter. I told him that Mallett & Mehegan were no longer in business—that S. Mallett was their successor; that she had

some butter, but only for retail. He asked me the price, and I told him and sold the butter and shipped it direct. No. 14, Oscar Frommel & Bro., November 23, $22 90, was ordered by me as attorney for S. Mallett through the mail. My impression is that they wrote in reply to the order that S. Mallett was not rated by Bradstreet, and they shipped to order, notify, and Mrs. Mallett paid the draft. I think a few of the Irish potatoes are on hand now.

Q. Did you make any explanation in the letter as to why the change in business? A. I did not. I think these are all the goods purchased in New York.

Q. Where else did you purchase any goods? A. In Philadelphia. No. 15, Philadelphia Biscuit Company, November 26, $11.98. These goods were purchased from Mr. Thomas, the salesman. They were paid for on December 9 by check on the Bank of Tarboro, drawn by S. Mallett, per C. B. Mehegan, attorney. I received the goods and they have been sold, as near as I can recollect. No 16, Thomas Roberts & Co., December 6, 86 cents; ordered through the mail as attorney. They were only samples and part of them in the store now; they are not paid for. No. 17, Philadelphia Biscuit Company, December 12, $27.78. These goods were ordered through the mail by me as attorney; they have not been paid for; part of them are in the store now, and part of them have been sold. No. 18, Frank Teller & Co., December 14, $35. These goods were purchased by me as attorney from a gentlemen named Mayer, their salesman in this territory. They have not been paid for.

Q. Did you make any statement to him as to the financial standing of S. Mallett? A. I don't think I did.

Q. Did you make any statement as to the change in business? A. I don't think I did; don't think I made any statement except that Mallett & Mehegan had sold out to her and she was conducting the business for her

own benefit and profit. No. 19, Geo. Miller, Son & Co., December 19, $20. These goods are paid for.

Q. Who paid for them? A. When I was in Baltimore, on the 16th, my impression is that I sent them a check for the bill; I think it was a check given me in exchange for a check I had in Baltimore. They have not been received and I suppose they are at the depot. No. 20, Thomas Roberts & Co., December 20, $5.42. These goods have not been received—at the depot I suppose; I think they have been paid for by check I sent them on the Bank of Tarboro in the name of S. Mallett. I think this is all the Philadelphia bills.

Q. What other places did you buy goods in? A. In Baltimore. No. 21, Baltimore Pearl Hominy Company, November 30, $5. I ordered these through the mail, and I think they are paid for. S. Mallett paid for them by a check on the Bank of Tarboro. The goods have been received and some of them disposed of. No. 22, Matthai, Ingram & Co., November 27, $10.29. These were ordered through the mail and the goods received and paid for. They are all in the store. No. 23, M. Lahey & Sons, December 16, $15.90. Bought these goods in person; $100 of the bill is paid, leaving a balance of $15.90. I think they have been received and part of them disposed of. Never dealt with these parties before. Never made any statement to them, but paid them a check of $100, and told them I would pay the balance on the arrival of the goods. No. 24, Buckman Fruit Company, December 16, $24.15. Bought these goods in person. They were shipped to order, notify, draft with bill of lading attached; they have been paid for and part of them are in the store.

Q. Did you make any statement about the change of business, and why S. Mallett went into business? A. I don't think I did. No. 25, Vicari-Catanzaro Company, December 17, $14. I bought these goods in person; the

goods have been received and are in the store; don't think they have been disposed of; they are paid for. No. 26, D. W. Laws & Co., December 17, $31.83. Bought in person and paid $30 on them; paid in currency; part of the goods are in the store. No. 27, Geo. Blome & Son, December 18, $31.75. Bought these in person and the bill is paid. My impression is that I gave these people a check some one had given me in exchange during my purchases in Baltimore. All of these goods are in the store just as they were received. No. 28, Rodge & Koch, December 18, $102 93 I paid them $100 on this bill. Gave them one of the five checks sent me in New York.

Q. Did you make any statement to this firm as to the cause of Mallett & Mehegan going out of business and S. Mallett going into business? A. I don't think I did. These goods are in the store. I am positive none of them have been sold. Some wagons and toys which came in separate pieces have been put together. They came knocked down. No. 29, Rodge & Koch, December 20, $18.75 Bought this bill in person. It seems to me the larger bill was given after the smaller, and it is really a part of the same order. They have not been received. One hundred dollars has been paid on No. 28 and No. 29. These are all the goods bought in Philadelphia. Bought some in Richmond, as follows: No. 30, Kingan & Co., November 30, $25.85. My recollection is that I ordered these goods from the salesman here. Don't think the bill is paid, though the goods are received. Part of them may be disposed of. No 31, Kingan & Co., December 5, $6.25. My recollection is that that order was given the same time as the other, though the first shipment was from Richmond and the other from Indianapolis. These are all the Northern purchases.

Q. Have you made any purchases in the town? A. Yes, sir; but I can not say how much without the bills. Mr. Mallett is the bookkeeper.

Q. Can you give any idea as to what those purchases amount to? A. I can not.

Q. Do they amount to more than $100? A. Yes, sir; the bill in my hand is one of them, and that is more than $100.

Q. How much cash did S. Mallett have in the Bank of Tarboro about the time you went North? A. I don't know.

Q. Did she give you any information about it? A. No, sir.

Q. Did she say she would send you the checks when you went North? A. No, sir; I left here on the early train in the morning, and before I left I told Mallett to send me those checks to New York, care of the Metropolitan Hotel, and they were sent. I knew she had some little money in the bank.

Q. How did you know that she could send it? A. By buying checks; I knew she had some $800 or $900.

Q. Do you know what her cash deposit in bank is now? A. I do not.

Q. Can you answer the notice now to produce the evidence taken before the referee in this case? A. No, sir.

Q. Have you seen Mr. Moore about it? A. Yes, sir; I have asked him about it. I have not seen it since I saw it [in] Mr. Fountain's office.

Q. Have you a copy of the statement made by you January 1, 1894? A. I have not.

Q. You made a copy of it? A. I did have one; it was made on a piece of paper similar to that on which the original was made.

Q. Have you seen the original statement since it was given to Dr. Baker? A. Yes, sir; at the referee's trial; I have not seen it since.

It is ordered by the Court that the plaintiffs give a justified bond in the sum of $1,000 in this case.

Defendants move to dismiss the injunction until the bond is given. Overruled. Mr. Fountain, of counsel for defendants, states that he wants to go on record as opposing any continuance.

C. B. MEHEGAN, recalled by plaintiffs, testified. Direct examination, by Mr. Blount:

Mr. Mehegan desires to state that, since the last hearing of this matter and his examination therein, he has found out that the five checks sent to him in New York for $100 each were drawn on the Chase National Bank of New York.

Q. What book is this? A. The blotter of Mallett & Mehegan from August 1, 1895, to October 10, 1895.

Q. Please examine the page headed October 7, 1895, and tell us in whose handwriting those entries are? A. The entry of S. W. Bell is in my handwriting.

Q. At that time Mallett & Mehegan were in business? A. Yes, sir.

Q. Did you ship, or have shipped, about that time, some goods from your stock to S. W. Bell, at Kelford? A. I did.

Q. Who was clerking for you at that time? A. H. T. Latham.

Q. Who helped you pack those goods? A. I packed them myself unaided.

Q. Was Latham in the store?

(Objection by defendants. Overruled.)

A. Yes, sir.

Q. Who delivered the goods at the depot? A. Our driver.

Q. Did you go up there? A. No, sir.

Q. Is there any such man at Kelford? A. Not that I know of.

Q. How many goods did you ship there? A. The book

will show: the amount, according to the statement on the book, is $168.51.

Q. You are sure Latham went up there and delivered these goods? A. I don't think he did.

Q. Who went up there to attend to it? A. My impression is that I made out the bill of lading myself and sent them up by the driver, and he brought them back to me signed: I don't think Latham got the bill of lading.

Q. How long before you sent up to Kelford for these goods? A. Some time during the first week of October Term of Court: it might have been the 16th, though I don't remember the date.

Q. Who did you send for them? A. H. T. Latham.

Q. Had the attachment been issued? A. Yes, sir; against Mallett & Mehegan: but these goods were not attached.

Q. Did you give Latham the bill of lading? A. Yes, sir.

Q. Who was it indorsed by? A. By Mallett & Mehegan in my handwriting.

Q. Where was Mallett at the time these goods were shipped? A. In the store, I think.

Q. What particular duty did he have in the store? A. He attended to the books.

Q. You were equal partners? A. No, sir.

Q. Did his duties require him to take these entries off this book and put them on another book? A. I don't know that his duties especially required him to do it. We both worked on the books. My duties were to buy and sell the goods at wholesale, but we both performed the duties of the other.

Q. Who transferred these goods? A. They have not been transferred.

Q. Did you send any telegrams to Latham while he was in Kelford? A. I don't recollect.

(The defendants again object to this line of examination, for that the testimony is incompetent, as it does not tend

to show that the property is the property of the judgment debtors, and that the witness stated that he shipped the goods there and instructed H. T. Latham to sell same.)

Q. Did Mallett know that you shipped these goods to Kelford? A. I don't think he did, for the reason that the goods were packed and shipped from upstairs; they were brought down on the elevator; he was in the store. I can't say that Latham knew anything about it.

Q. Do you mean to say that you shipped these goods without consultation with your partner? A. Yes, sir.

Q. Did Mallett have access to these books? A. Yes, sir; I don't know that he saw the entry.

Q. Did you make the shipment about October 4, 1895, to E. T. Roberson, Robersonville? A. Yes, sir; that is my handwriting.

Q. Was Latham in the store? A Yes, sir; I packed these goods unaided.

Q. Your partner knew nothing of it? A. I don't think he did.

Q. Was Latham in the store? A. I don't remember.

Q. Any such man in Robersonville? A. Not that I know of.

Q. What is the amount of these goods? A. It adds up to $185.09. The addition is not in my writing.

Q. I see another item: T. H. Parker, October 5, Rocky Mount? A. That is my writing.

Q. Any such man there? A. Not that I know of.

Q. Who got the bill of lading for the Parker goods? A. My recollection is that the drayman got it.

Q. Did you send Latham to look after these goods? A. I don't think I did.

Q. Did not Mallett go up to Rocky Mount about these? A. I think he did; I sent him there.

Q. Did you, on or about the 9th of October, 1895, make a shipment to M. H. Owens, Williamston? A. Yes, sir.

Q. Any man of that name there? A. Not that I know of.

Q. What is the amount of it? A. (Adds it up.) $129.56, according to my addition.

Q. Has the partnership of Mallett & Mehegan any lands in this town? A. No, sir.

Q. Anywhere else in the county? A. Yes, sir; at the village of Lawrence. The deed was made to myself as trustee of Mallett & Mehegan. By the deed of trust I had a right to convey it.

Q. Can you give us any idea as to the market value of it? A. It can be sold for $135. I know of no other real estate in this county belonging to the firm.

Q. The title is still in you? A. Yes, sir.

Q. Do you own any other lands in this county? A. I own in a similar way the reversion after the life estate of J. B. Carr. There is no other property in the name of Mallett & Mehegan.

Q. What is the value of that reversion? A. I have a standing offer of $135.

Q. Do you own any real estate in your name? A. The Mehegan homestead and the property occupied by Simmons.

Q. Who did the Mehegan homestead belong to? A. My father. I don't think he left any will. There are no encumbrances on it. I suppose, according to law, there are eight heirs.

Q. What do you think the property is worth? A. I don't know.

Q. Has your mother any interest in it? A. I suppose she has a dower in it; but I don't know whether it has been laid off to her or not.

Q. What do you think the property would bring if sold at the court-house by the owners, for cash? A. $2,500 or $3,000.

Q. Who occupies it? A. My sister, Mrs. Mallett.

Q. Have you any present interest in the Simmons lot? (Objection.)

A. No, sir.

Q. Has Mallett? A. No, sir.

Q. What interest have you in it? A. It was left to me and my brother after the death of Mr. Bond's widow; it is in town.

(Objection.)

Q. What is it worth.

(Objection.)

A. I don't know.

Q. What is your judgment?

(Objection.)

Counsel for plaintiffs states that it is alleged in the affidavit that debtors have less than $2,000. Mr. Moore states that this is not the place to inquire into it. No matter what the value is, the Court would have to proceed. The Court states that it does not see that it is material to the question, and ought not to be asked.

Q. Is that all the land? A. A year or two ago I invested $500 in some land in Alabama.

Q. Do you remember the day the attachment was issued? A. Yes, sir; on the morning of the 11th October, 1895.

Q. When did Mrs. Mallett become a free trader and go into business.

(Objection.)

Counsel for plaintiffs states that he is examining this witness as a witness. Mr. Fountain wants to know if all this evidence is as a witness or judgment-debtor.

Q. Can you state now what day Mrs. Mallett was made a free trader?

(Objection by Mr. Moore, because it is mingling up two cases, and the witness has not been summoned as a witness but as a party. Objection overruled.)

A. November 16, 1895.

Q. When did you and your partner sell to Mrs. Mallett your personal property exemptions?

(Objection by Mr. Fountain, because the question has been asked before.)

A. November 15, 1895. Upon examining the paper I find that Mrs. Mallett became a free trader on the 15th day of November.

Q. Were you both present when you sold your exemptions? A. I think not.

Q. Did you ever have any conversation with Mrs. Mallett when Mr. Mallett was present about going into business and buying your exemptions? A. I don't recollect.

Q. Who made the proposition to buy? A. I made the proposition that she buy.

Q. What did she pay you? A. $100 cash and a note for $132.92 for a part of the balance and $119.50 for the balance. I have the note.

(All questions relating to Mrs. Mallett and the exemptions are objected to by defendants.)

Q. What did you do with the money? A. I had allotted to me two accounts—$19 and $28.91. They were not included in the transaction I had with Mrs. Mallett.

Q. I understood you to say when on the stand before that Mrs. Mallett had received in one way and another $800 or $1,000? A. I don't think I made any such statement. (Upon examination of the testimony, it is shown that the witness stated $800 or $900.) I did not think I was asked the question.

Q. How much money did she have before you went on to buy goods? A. I don't know: she never told me.

Q. About what time did she tell you she had the $800 or $900? A. About the time we sold our exemptions to her.

Q. Do you know where she got that money? A. I don't know positively; I know Mallett & Mehegan paid her some money in July, 1895.

Q. What account did you keep of that? A. On the ledger. Part of that money is charged to my personal account, and part to expense account; the part charged to me was for my board and lodging, and the part paid for Latham is charged to the expense account.

Q. Was it paid to her before or after the reference trial? A. There was some money paid to her before the reference trial.

Q. How much; give us some idea? A. I don't know.

Q. How paid after? A. I don't know. I know that the books show that prior to going into the trial some was paid her. Get the book in here and I will tell you all about it. (Mr. Blount states that he has the ledger and has sent out for it.)

Q. Is it not a fact that most of the money was paid Mrs. Mallett about the time of this reference? A. No, sir.

Q. Where did this money that you and your partner paid Mrs. Mallett come from: out of your business? A. Yes, sir; out of the business. (The ledger is handed witness.)

Q. Take the book and see if you can inform us where the statement is; I can find nothing about it. A. July 1, 1895: "Amount paid board bill to July 1, 1895, $3,300."

Q. Paid to Mrs. Mallett? A. Yes, sir There is also entered here, "Board for July, August and September, $150." C. B. Mehegan's account, "Paid board to July 1, 1895, $1,237.50." "Board for July, August and September, $54.50." The page upon which the item of $3,300 is charged is J. P. Mallett's individual account. The item in expense account is the board and lodging of H T. Latham to July 1, 1895, $1,218.75. I think the entries were made July 1, 1895, though there is no date, except it is under the date July, 1895. From all these accounts paid to Mrs. Mallett is to be deducted the account which Mallett & Mehegan had against her; her account is not added

up. The amount of cash really paid to her at that time was $873.04, July 1, 1895.

By Mr. Fountain:

Q. How long has that account been running? A. From January 22, 1890.

Mr. Blount resumes:

Q. Assuming that this suit was brought March 4, 1894, have you any accounts with Mrs. Mallett prior to that, such as this you have just read? A. Yes, sir; this account here is stated before that—January 2, 1893. It is an account just like the other. This account is marked "Home." We charged her with everything.

Q. When was "Mrs. J. P. Mallett" inserted after "Home"? A. I don't know; the writing is Mallett's.

Q. Was the writing on page 630 put there at the date it purports to be? A. It is impossible for me to say.

Court takes a recess until 3.30.

Hearing resumed pursuant to adjournment.

Mr. Blount resumes the examination of Mr. C. B. Mehegan:

Q. Tell us what plan of keeping house Mrs. Mallett had before March 4, 1894?

(Objection.)

A. To the best of my recollection, about 1878, my sister assumed charge of the household affairs. The residence belongs to my mother as widow of my father. My sister took charge of the management of the household affairs. Mother charged her no rent for the house and sister charged her no board. Since 1879 my brother, now dead, paid her board, and I also paid her board from 1879. She collected the money and paid the expenses. Since my brother, who is now in the bank, became old enough he has been paying board—for five or six years.

Q. You kept your board paid up as you went along? A. No, sir.

Q. How much board did you pay? A. $17.50 per month, board, lodging, fuel, and she furnished the room; she paid the expenses out of her own pocket.

Q. Who else besides you, your two brothers and Mr. Mallett, boarded with her? A. To the best of my recollection, W. R. Ricks and wife boarded there some time, and just prior to that one or two clerks boarded with her. One of my sisters, Mrs Dawson, was married in 1884, I think, and she boarded there for a year or more. My other sister was married about 1886, and she and her husband boarded there for a year or two; they all paid board.

Q. Is it not a fact that, prior to January, 1894, Mrs Mallett traded at your store and got most of what she bought there? A. She traded there a great deal and the books will show what she got.

Q. Was it not the board of yourself, Mr. Mallett and the clerks paid in that way, in a great measure? A. Yes, sir; in a great measure.

Q. Look at page 630—charges against "Home"—was that a charge against her or a mere statement to show the expenses? A. No, sir; it was a charge against her; I don't know when her name was first put after "Home."

Q. Do you remember when you first saw her name put there? A. No, sir.

Q. Do you remember the auction sale? A I remember the sale under the execution. I remember the sale of the goods the sheriff took from Mallett & Mehegan.

Q. Did you bid on the goods at the sale? A. I bid on only one article for myself and that was ten cents, and I bought it. I bid on some other articles for Latham.

Q. Did you have any understanding with Latham before you did the bidding? A. My recollection is that I did. Latham or some one told me; I think it was Latham, that

he, Latham, had about $400, and said if the goods went cheap he would buy some.

Q. I want to know what direct authority or instructions you had, and when it was, and how it was, that you bid for him? A. I think it was on Monday, the day the sale was had; just before the sale took place, I said to Latham, "Tom, come and go up to the auction, and if you want to invest that money, I will point out to you such things as I consider bargains." After that he went up there and I told him I would bid for him, as I had nothing to buy with. This is the best of my recollection, though I know I did talk with him.

Q. Do you remember seeing Arnheim there? A. Yes, sir.

Q. Is it not a fact that you made a proposition to him that you would not bid against each other, as you both wanted to buy? A. I did not make any such proposition for myself, though he may have taken it that way.

Q. Did you not tell him not to bid against you, as you wanted to buy the tinware? A. I did not.

Q. Among the things garnisheed, I notice a mortgage and for $639.83, against J. A. Warren? A. I don't know the amount of it, though I know Mallett & Mehegan had a mortgage against him.

Q. Have you collected anything on that since it was garnisheed? A. No, sir; I have collected nothing on anything garnisheed.

Q. Do you know anything of the value of that debt? A. I could collect it. The first note is due January 1, 1896; the second January 1, 1897, and so on. There are five of the notes, each for the same amount. The security is a mortgage on his farm over the river, about one hundred and sixty acres.

Q. Do you know the amount of the first mortgage? A. No, sir; I don't know positively that there is another

mortgage. The note of M. H. Pippen, $283.79. Don't know when is due unless I had the note. Something has been paid on it, though I don't remember how much. It was orginally $400. I don't remember whether it has been reduced below $283. The note of $50 against B F. Havens is secured by mortgage on several horses. The debt of B. F. Dawson has not been settled. I don't know whether he is worth over his homestead. O. Burnett owes something on the $39.40, but I don't know how much. He informs me that he has a contra account. My impression is that $260 is due on the note of W. T. Gray and others. Some of the parties live out of the State. If you attempt to collect it at once I don't think it would be good. Lichtenstein & Co. don't owe the debt of $92.46. Mallett & Mehegan owed him something at the time of the attachment. The account was never balanced, and we owe him eight or ten dollars. The bill of $16.20 against C. M. Dancy is still due It is not solvent, but I believe I could collect it. The debt of F. H. Pender for $28.91 was allotted to me in my exemptions. You could not force the collection of the debt against J. E. Bullock for $59.64. I have had many transactions with him and he has always paid. Dupree & Jenkins don't owe anything, and that must be a mistake. We may owe J. L. Bridgers something against the account of $16.12 against him. I don't think the debt of $23.62 against W. E. Page can be forced. The open account of $149 against J. A. Warren is still due. It is in addition to the mortgage debt, and he has a contra account against it. You can't force the collection of it. J. O. Harrell did owe something, but I don't know how much. You could not force the collection. Cicero Denton is not solvent, but he has been to the store to pay that account. I told him to pay the sheriff. The account against S. P. Jenkins is the same as that against Dupree & Jenkins. I don't know whether he is solvent or not.

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It is due. John Jones, $64.16, has not been paid. It is still due. He told me since this attachmet was served that he came to town to pay me the money.

By Mr. H. A. Gilliam:

G. A. Bailey owes something on the note of $340. The payments may possibly reduce the face of it. The payments are small. My impression is that all the payments are indorsed on it. Owen Jones, $70, March 7, 1894, 8 per cent after June 1, has not been closed up. There is a mortgage to secure it. Nothing has been paid on it. The accepted draft of H. H. Ward, $52.83, has not been paid nor any part of it. The draft of Mallett & Mehegan, by J. T. Moore on Geo. Howard, Jr., has not been paid, and is still due. Note dated May 9, 1890, J. L. Faithful, $40. He owes something like fifty or sixty dollars. The paper attached is collateral to it. C. Peacock, note, not paid. He is a railroad man. Don't know where he lives. No security. J. M. Rowe, note, not paid. He is a son of R. H. Rowe. No security. The credits are entered on the mortgage of W. T. Gray and others

(Defendants object to the examination along this line, and to all the evidence taken upon it.)

Mr. Fountain again asks for the papers upon which this witness has been examined.

Q. Does this mortgage embrace all the indebtedness of W. T. Gray and others? A. I don't know.

Q. If you have a book account against him and the other makers of this note, any payments would appear upon the account? A. Any payments on the account would appear on the account. The credits are entered on the H. J. Whitmore note. No payments except those entered on the book and note. Notes of J. B. Crisp, $15, January 23, 1894; $30 January 23, 1894, were due our firm. They have not been satisfied in full. They are

secured by chattel mortgage. The payments appear on the notes. Isaac Killebrew, $75, not settled. Secured by a horse, and the horse died. We have no indebtedness against M. E. Vines. Note of B. S. Johnson, $101, secured by a judgment against E. Cromwell, which is transferred to us. No part of it is paid. Note of H. H. Boone, $16.60. Don't know whether it can be collected or not.

Q. I will ask you if you have collected any accounts due the firm of Mallett & Mehegan, or any amounts, or notes or mortgages due the firm of Mallett & Mehegan since the attachment was levied? A. I have collected some accounts. I collected from Orren James thirty or thirty-five dollars first week of court: one from a man by the name of Lane for two or three dollars.

Q. You spoke this morning about investing $500 in some property in Alabama. What does it consist of? A. I sent the money to some parties there about three years ago. I don't know whether the title is in me or not. I have never seen the deed.

Mr. Fountain demands the papers about which this witness has been asked. Mr. Blount states that they are his private papers. The Court states that the defendants were entitled to the papers for the purposes of this examination. Papers about which Mr. Gilliam examined the witness are handed to Mr. Fountain.

Court takes a recess until 9 o'clock Saturday morning, December 28.

Court met pursuant to adjournment on Saturday, December 28, 1895, at 9.30 a. m., Mr. C. B. Mehegan being on the stand.

CROSS-EXAMINATION.

By Mr. Fountain:

Q. In your examination in regard to your list of notes,

you stated yesterday to Mr. Gilliam that the credits indorsed on those were all the credits: state how it is. A. By comparing one of the notes with my book I find there are some few credits left off of it. Those now entered on the notes will be found on bills receivable.

Q. You were asked if you collected some accounts, and you stated that you did. Where is that money now? A. I spent it.

Q. You were asked about certain goods you shipped to different places. Where are those goods now? A. I sold them and spent the money.

Q. Can you tell us when Mrs. Mallett opened an account with Mallett & Mehegan; turn to page 108 of the ledger? A. January 23, 1890.

Q. Look on the account, on page 108, and tell us how you find it and what the heading is? A. Mrs. J. P. Mallett.

Q. You find charges made against her there? A. Yes, sir.

Q. Look and give us a few of the things you find charged. A. The first thing is 2 pounds of cheese, 30 cents; 5 pounds of coffee, $1.35; meal, 20 cents; cash, $2.10.

Q. Glance over the account and tell us if it is for the supplies of a house? A. It is an account against Mrs. Mallett for groceries, money, etc., gotten for the purpose of running her household affairs, I suppose.

Q. Will you follow that account up? A. The next appearance of that account is on page 109, June 2, 1890, the balance brought forward, $249.87. Next page 359; date the balance is brought forward is September 20, 1890, $488.96. On this page the account is headed "Mallett House Account." The next page is 375, January 1, 1891, the amount from folio 359 is $862.16. That account is headed "Home Account."

Q. State, if you know, if the account headed "Mallett House Account" and "Home Account" is Mrs. Mallett's account. A. It is an account against Mrs. J. P. Mallett; it runs to pages 376 and 377. The balance forward from page 377 to 526 is $1,772.73, January 1, 1892. The next page is 527, May 2, 1892, forward from 526, $2,097.72; carried forward from 527 to 528, October 1, 1892, $2,440.05; carried forward from 528 to 630, January 2, 1893, $2,701.51; goes to 631, August 1, 1893; brought forward from 630 to 631, $3,267.55; carried forward from 631 to 676, March 1, 1894. This account is headed "Mrs J. P. Mallett Home Account"; amount forward, $3,903.90—the amounts I am naming are the balances brought forward; from 676 to 677, November 1, 1894, $4,324.58; carried forward from 677 to 717, July 1, 1895, $4,883.21. The accounts extend from July 1 to October 1, and the debits are added, $6,017.39, and the credits are $6,018.75.

Q. State if that is a continuous account from the beginning to the end. A. Yes, sir.

Q. Turn to page 1 of the ledger; do you find there an account against John P. Mallett? A. Yes, sir; 1890.

Q. Turn to the ending of that account, on page 11; when does that end? A. The last date showing here is September 5, 1895.

Q. Is that a continuous account—one page right after the other? A. Yes, sir.

Q. Who is John P. Mallett? A. He is the husband of S. Mallett and a former partner of C. B. Mehegan; he is a defendant in this case.

Q. Do you know whether or not Mrs. Mallett ran an account before Mallett & Mehegan went into business? A. I think she did, but I don't know it positively; it has been so long ago.

Q. You were asked about a statement made by Mallett & Mehegan, January, 1894, which Dr. Baker testified that

you made a statement to him showing the assets of the firm to be worth $17,000, total amount being a little over $19,000, with a credit of about $2,000; state the heading of that statement and how it was made up. A. On January 1, 1894, Mallett & Mehegan took an inventory of their goods at the cost price to them, and an inventory of the other personal property. They counted the amount of cash on hand at that time and they took a list of their notes, mortgages and judgments, and a list of the book accounts as they appeared on the books. This statement was headed "General Statement and Inventory of the Assets of Mallett & Mehegan, January 1, 1894," and from the assets was deducted the amount of the Northern indebtedness that was due by Mallett & Mehegan as it appeared at that time. It was a correct statement of the matters as they then were.

Q. When was the attachment levied against Mallett & Mehegan? A. On the morning of October 11, 1895.

Q. Prior to that, did you begin to make a statement of your business? A. I did.

Q. You did not complete it, did you? A. No, sir: I did not.

Q. State, if you can—look at your memorandum—if you got up a statement with the data you had, and what that statement was, and how it was arrived at. A. I made this statement by referring to the Judgment Docket in the Clerk's office, as I did in the statement of January 1, 1894, and by referring to the amount of the balances that were due to Mallett & Mehegan upon the notes and mortgages, the amount of balances due Mallett & Mehegan upon their books, the estimated value of the stock of goods and the other personal property which was in our possession at the time the attachment was served.

Q. About what time did you make that statement? A.

It was just prior to October 11; to be more accurate, it was between the 1st and 10th of October, 1895.

Q. That statement is absolutely correct, as appears from your books and the Judgment Docket, with the exception of estimating the value of the stock? A. I did not get an opportunity of taking an inventory of the stock, and there may be included a small amount, more or less, to what I have here, the difference between this statement and the actual result, if gone into, with interest figured up and credits deducted, I don't think it would vary $200.

Q. What is the footing of that statement?

(Objection by plaintiffs.)

Counsel states that he does not see what it is offered for; that it is secondary evidence and the best evidence is the books and accounts; that it would be unfair to let the defendant introduce a declaration of his own.

Mr. Fountain:

The statement was made from the books; that it is in evidence that since that time they have had no opportunity of having the books in their possession; that the plaintiffs have had the ledger in their possession.

(Objection overruled. Exception.)

A. The footing of this statement is $16,298.39.

Q. Was there any assets on the books of Mallett & Mehegan charged in the statement of January, 1894, that were struck off the books when this statement was made? A. Yes, sir; an account against Mrs. Woolard for $2,244, and a note for $405.96.

Q. Those items appear on the statement made January 1, 1894? A. Yes, sir.

Q. Put those items to the statement made just before the levy; what does it foot up? A. $19,948.35.

Q. How long have you been in the mercantile business for yourself? A. Since January 23, 1890, to the time of the sale of my personal property exemptions to Mrs. Mallett.

Q. What was your business before the time you went into business for yourself? A. I was employed by Mrs. Woolard from November 9, 1889, to January 23, 1890. Prior to that time I was in the employ of Sol Woolard. He was in the wholesale and retail grocery business; I had been in his employ about ten years.

Q. Did you ever have charge of the books and the general superintendence of the stock of goods? A. I did for the last two or three years of his life.

Q. What business have Mallett & Mehegan been in since they commenced? A. The wholesale and retail grocery business.

Q. State whether or not the estimate of the stock which you placed in this statement is a fair estimate of the stock and fixtures you had on hand at that time. A. I think from the best information obtainable from the quantity of goods removed, the force employed and the length of time it took to remove them, that is a fair estimate.

Q. It is alleged in the affidavit in this case that you have goods and property that you unjustly refuse to apply to the payment of this judgment; state if you have any money or goods or any other kind of property, except the exemptions allowed you at the time of these proceedings? A. I have nothing but my exemptions allotted to me and my clothing. I have sold my exemptions to Mrs. Mallett; of course, as I stated in my examination by Mr. Blount, I did not sell to Mrs. Mallett the accounts allotted to me.

Q. It is also alleged that the property in the store occupied by Mrs. Mallett is the property of Mallett & Mehegan; state if you have any interest whatever in that property. A. I have no interest in that property, and I have nothing in there except the purchase of ten cents I made at the auction sale; I don't know that this is there, but it was in there.

Q. Do you know of your own knowledge who the prop-

erty in the store occupied by S. Mallett belongs to? A. All the goods downstairs belong to her and upstairs to H. T. Latham, and the iron safe belongs to B. F. Dawson.

Q. Has J. P. Mallett any interest of any kind whatever in the goods in that store? A. None in the world that I know of.

Q. Has he, to your knowledge, any property anywhere, save that allotted to him in his exemptions? A. None that I know of

Q. Had you any property at the time of the issuing of the supplemental proceedings in this case, save the proceeds of the exemptions allotted to you, and the real estate? A. Not that I am aware of. There is one thing in the statement prepared just prior to October 10, 1895, compared with the statement of January, 1894, is that in the statement of January, 1894, Mallett & Mehegan owed Northern indebtedness somewhere between $1,900 and $2,200, and just prior to October 10, 1895, they owed very little Northern indebtedness—to the best of my recollection they only owed about four or five dollars; this $1,900 or $2,200 is the amount credited on the statement of January, 1894.

Q. There was something said on the examination of J. P. Mallett in regard to the furniture and property in the house of S. Mallett; if you know anything about the property in the residence, state what it is. A. To my knowledge there is a wardrobe and another piece of furniture in the passage—I don't know the name of it; a book case, a lot of parlor chairs; those things belonged to my mother, and she had them at the time of the death of my father; there is one set of furniture Mrs. Mallett paid $60 for at the time she was teaching school; there is a sewing machine and dining table she bought; a suit of furniture she bought in 1892 and paid for it with her own money; there is a sideboard she bought in 1892 and paid

for with her own money; there is a suit of furniture I bought in 1889 from J. A. Warren for $25 and gave it to her that year. There are several pictures, some of them I gave her in 1891 as a Christmas present and some in 1892. The suit of furniture in her bed-room was given to her by Mr. Mallett as a bridal gift just before they were married. The dining-room chairs she bought with her own money; bought them at Dr. Batts' sale and paid for them. I don't know how long she taught school—a year or more.

Q. You were asked about parties who had boarded with Mrs. Mallett and you stated some; state now, if you can, more fully who boarded with your sister, Mrs. Mallett. A. My brother, Frank, now dead, from the summer of 1876 to the spring of 1882, I think; a gentleman by the name of Pierce; I think he was a clerk in the employ of Mallett & Hart; it was before the dissolution of that firm and before Mallett's marriage; W. R. Ricks and wife for a year or more; J. A. Warren, Sol. Woolard's brother, Stanley Woolard, for a year or more; Charlie Woolard, C. G. Bradley and wife for a year or more; B. F. Dawson and wife for a year or more; myself, J. G. Mehegan and the driver at the store, and two children of W. S. Frizzle—it seems to me they were there for a year or more. I don't recollect any more.

REDIRECT EXAMINATION.

By Mr. Blount:

Q. Turn to page 108 of the ledger; state what credits, if any, to Mrs. Mallett on that page. A. $11.75, cash.

Q. Page 109? A. By cash, $33.25; page 359, by cash, $10; page 375, by cash, $4.50, $11.50, $11.50; by meal (I suppose damaged meal returned), 35 cents; by cash, $11.50; page 376, June 1, 1891, by cash, $11.50; page 377, by account, $2.58; by cash, $34.50. No credits on pages

526, 527 and 630. Page 631, by pork, $2.70; page 676, by bacon, $1; by bacon, $17.82; by bacon, $15.29 (fresh meat, I suppose). No credit on page 677; page 717, by board account of C. B. Mehegan to July 1, 1895, $1,237.50; by board account of clerk, H. T. Latham, to July 1, 1895, $1,218.75; by board account of J. P. Mallett to July 1, 1895, $3,300. September 2, by board of J. P. Mallett for July, August and September, $150; by board for Mehegan and Latham for July and August, $75; by Mehegan and Latham for September, $37.50; by Mallett for September, $50.

Q. The Mallett referred to is the husband of S. Mallett? A. Yes, sir.

Q. S. Mallett is your sister? A. Yes, sir.

Q. What kin is Latham to the family? A. I really don't know; there is some relationship to Mr. Mallett.

Q. What time did he begin to clerk for you? A. January, 1890.

Q. What wages did you pay him? A. $25 per month and his board and lodging.

Q. Did your firm pay him his wages as they became due? A. Think his account on the book will show. Page 169, H. T. Latham, by services, 1890, to December 31, $300. The balance paid him, as appears on the books, was $76.14. I am testifying from the books. I did not settle with him. In connection with the 1890 account, J. P. Mallett has charged up to himself $25 for one month of Latham's services.

Q. How does the account of 1891 appear? A. Part of it is on page 169. The first item is brought down $76.14. January 8, debit of $14.50, cash and several other items. On February 10, it appears that he was paid the balance for 1890, $76.14, after it was brought down; it was paid in 1891. The account is carried forward to page 458. At the end of the year the way it is here is for one month $25

and board $150; this last item is charged and credited, too. Balance, $1.96 at the end of 1891, due Mallett & Mehegan.

Q. Come on to January, 1892? A. Balance brought forward from page 458 to page 99 is a debt of $120.67, August 1, 1892. The end of the account is August 1, 1892, by cash $50, and December 31, by services for the year 1892, $300; as the books appear, balance due him December 31, 1892, $55.16; January, 1893, shows that the balance is brought down to his credit; it appears that this balance was paid him February 13, 1893.

Q. Turn to the account of 1893? A. The end of the account on page 99, the balance carried forward to page 92 is $256.04 against him. On January 1, 1894, page 92, Latham is credited with his services for 1892, $300. Right under this is January 1, 1895, by services for 1893, $300. The balance is $11.95, due Mallett & Mehegan. The top of this account is January 1, 1895. The date of the last item is December something (blurred), 1894.

Q. Turn to the account of 1895? A. That balance is forwarded to page 56. Begins January 1, 1895, with the amount brought forward from page 92, $11.95. There is only one item of credit, July or May 6, by cash, $1. The account is not balanced; it foots up on the debit side $227.75, leaving a balance of $226.75. The last item is October 10, 1895, to cash, $2 He is not credited with the services of 1895. This is the end of the account.

Q. Turn to the begining of J. P. Mallett's account; is there anything in the personal account showing what board he paid to Mrs. Mallett? A. Not in the first part. It first appears without any date between July 1 and 19, 1895. The entry reads, "Amount board bill to July 1, 1895, $3,300."

Q. Turn to your individual account for board? A. It appears here without a date between July 8 and 27, 1895,

"Amount paid board bill to July 1, 1895, $1,237.50." Mrs. Mallett was credited with these amounts and account deducted.

Q. The credits of $6,018.75 includes the board of yourself, Mallett and Latham? A. Yes, sir; this amount is the correct amount of the board of C. B. Mehegan, J. P. Mallett and H. T. Latham from January 23, 1890, up to September 1, 1895, as I understand it from its appearance on the books.

The plaintiffs show by the Clerk's docket that these causes were referred at October Term, 1894, and again referred to Thos H. Battle at June Term, 1895.

Q. I understand you to say that you paid her some cash since the institution of this suit? A. No, sir; I have paid her $35. I suppose from the books that it has been paid, as I told Mallett to do it, and he told me he did pay it.

Q. Is that all the money she has been paid out of the store? A. I have no knowledge of what she has been paid; I can tell you what he told me; he told me he had paid her the balance due of $873. Before Mallett & Mehegan went to trial before the referee, they requested Judge Connor, who was one of their counsel, to come down to our office. I sent for him on some other business, and while he was there Mallett asked him about this account. I did not know that we owed her anything. He told Judge Connor that we owed her this balance and asked him if he had a right to pay it, and Judge Connor told him he had, and I told him to pay her, and he did pay her the $873. He afterwards told me that Mrs. Mallett had presented a verbal account for the board of our driver, and said she was entitled to the board and wanted it, $2 per week, and he told me that it amounted to that amount. She has been paid $1,400 or $1,500. We hired the driver at the store by the week, from $1.50 to $3 per week and board. Since that time I have paid Mrs. Mallett $35—

$17.50 for myself and $17.50 for H T Latham for October board.

Q. Will you please tell us, at the time Mallett married your sister, how many of the family lived with your mother? A. My recollection is that there was only one unmarried sister.

Q. You lived with the family and so did Mallett? A. Yes, sir.

Q. I understand these items charged on the book are the items she got out of the store? A. Yes, sir.

Q. Was it not understood at the time that you were to board with her and that she was to have the necessary supplies out of the store for it? A. No, sir.

Q. Why was not the board credited up from time to time? A. I don't know; Mallett kept the books and was careless about it.

Q. Any other account of that size allowed to run on your books without any notice? A. There are some pretty large accounts here; Mrs. Woolard's, two thousand and some dollars; it was an account for groceries, moneys and supplies purchased from Mallett & Mehegan. She has made payments and they were credited

Q. Your sister was entitled to these credits all along? A. Yes, sir; of course, it should have been done monthly or yearly.

Q. As I understand the statement prepared, it is an estimate you made? A. A good many things on it are correct, and I can show all the things on it if you will let me have the books and papers.

Q. I see a judgment here, S. W. Smith? A. It is on the Clerk's docket; you can not force the collection; that debt was included in the general inventory and assets made January, 1894; I don't know whether the judgment against W. A. Williams is solvent; he is dead; I don't think the F. B. Knight judgment is good; you can't

force the collection of the J. B. Carlisle debt. A good many items in this statement are the identical items Mallett & Mehegan had on hand and which go to make up the statement of January, 1894. The judgment against E. Cromwell can not be forced. I sold the judgment against Staton Cummings for $45 and spent the money. I don't know the condition of Haywood Clark. I had other notes against him prior to January, 1894, which I collected. The purpose of the statement is to show the face amount of these judgments.

Q. Do you mean to say that in making the estimate of January, 1894, you stated these at their face value? A. Some I did and some I made an estimate of.

Q. Do I understand you to testify that the day the sheriff took charge, your stock was worth $7,000? A. I mean that the amount of property he took away from the store represents to Mallett & Mehegan that much money at cost.

Q. What did you put down the stock in the statement of January, 1894? A. $5,675.

Q. Was it high? A. I think there was that amount in the store of Mallett & Mehegan, and the stock at Coakley, in addition.

Q. Do you mean to say that the stock the sheriff took was worth more than the stock in 1894? A. I mean that it cost Mallett & Mehegan that. I sold some of the goods on hand in July, 1895, and sold some of them to pay debts. I was asked on the trial if I estimated the stock, and refused positively to answer.

Q. Do I understand you to say now that, in your judgment, when the sheriff seized that stock it was worth as much as it was in July, 1895? A. I have before answered this question in the negative. I am very positive that we had more in July, 1895, than we did in January, 1894; that is, by taking a general survey of the whole stock.

By Mr. Gilliam:

Q. What became of those goods shipped back by H. T. Latham from Kelford? A. These goods, according to my best recollection, were shipped by me from here to Greenville, and afterwards sold by me to Latham in Greenville for $50, and afterwards re-shipped here. Latham paid me his own money for them and I spent it.

Q. Did you sell them as agent of S. Mallett? A. I did not; I had a right to sell them, as they were not attached.

RE-CROSS-EXAMINATION.

By Mr. Fountain:

Q. Turn to Latham's account again, the charge made against him on page 169; see what the charges are mostly for. A. Most of them are for cash paid by Mallett & Mehegan to Latham.

Q. Turn to the next page, 458. A. It appears that very nearly all of it is for cash, both for 1890, 1891 and this part of 1892.

Q. Turn to the next page. A. Very nearly all of this is for cash—the balance of the account for 1892. Very near all the account for 1893 is for cash; very nearly all the account for 1894, page 92, is for cash; very nearly all the account for 1895, page 56, is for cash. This winds up the account as it appears on the book.

Q. Do you know if H. T. Latham had any Building and Loan stock? A. My impression is that he took out some at the time of the organization of the Association; it was about 1889. I don't know how many shares he had.

Q. Do you know whether he has drawn out the money for the stock? A. I do not know.

Q. Did you have in your store any rum, whiskey? A. There was a bottle of corn whiskey on the desk, allotted to me, and a bottle of rum on the mantel.

Q. What became of it? A. The last time I saw them was on the afternoon they began the removal of the goods. Captain Watson had it. He went out of the store and locked the door behind him.

Q. The sheriff stated that Captain Watson was his deputy and had charge of that store? A. Yes, sir.

Q. Were you at the sale made by the sheriff? A. Yes, sir.

Q. State when that sale was advertised to take place. A. On Monday, the 18th day of November.

Q. Did you go down on the day the sale was advertised to take place, and the place the sale was to be made? A. Yes, sir.

Q. Was the sale made? A. No, sir.

Q. What was done? A. The auctioneer came upon the scene, locked the door once or twice and then announced that no sale would be had.

Q. Anything done relating to the sale? A. I don't remember anything else now.

Q. Did they sell afterwards? A. Yes, sir; the sale began the next day, Tuesday, the 19th, about 12 o'clock.

Q. Were you present that day at the meeting when the auctioneer went down for the purpose of making the sale? A. Yes, sir.

Q. What did he do? A. When I first went down there, I think it was 10 o'clock, exactly, on Tuesday, November 19, 1895.

Q. Was any sale advertised to take place that day? A. None that I know of. I went down there about 10 o'clock and asked Mr. Williams, Jr., about the time the sale would take place, and he said he did not believe there would be any sale. He went out and left a little book on the counter. I looked at it and it appeared to be a book of inventory taken of the stock. I looked in the back and saw that an effort had been made to work out the cost mark of

Mallett & Mehegan, but they had failed. At the back there was a sum total of $3,000 or $4,000. I said, "Brick, they have tried to work out the cost mark and failed." He said, "You have not looked at the book," and said that the sheriff had told him not to let me look at that book. I told him it was outrageous to take the goods and not let me know anything about what they took. He said the sheriff said not to let anybody see it. About 15 minutes to 12 the auctioneer came and announced that there would be no sale that day. I don't know who else was present except Latham. I came out of the store and went down to the store of S. Mallett.

Q. Do you remember to have seen Bisco Pittman there that day? A. Yes, sir.

Q. Did you see V. B. Knight? A. No, sir; he was here Monday. He was a merchant at Lawrence. He brought several teams. I saw nothing of him on Tuesday. Bisco Pittman is a merchant in the country and does quite an extensive business for a country store.

Q. What took place when you went back to the store? A. I had scarcely gotten down there when Leon Williams came down the street proclaiming that the auction would take place immediately, and Latham and I went to the building and the sale was then going on. This was about 12 o'clock Tuesday, November 19, 1895.

Q. How long did the sale continue that day, and from day to day? A. My impression is that the sale of the morning continued until about 1 o'clock, and then it convened again about 2 o'clock, and then they sold until very near 4 o'clock, and adjourned until next morning, Wednesday, and sold from 10 to 1, adjourned to 2 and sold from 2 to 4, near nearly. I can't tell exactly. Met again next day, Thursday, at 10, and sold from 10 to about 1, and adjourned to 2, and then sold from 2 to 4; adjourned from the afternoon of Thursday until Friday and sold until

about 1, and then adjourned until 2, and sold from 2 to 4. That afternoon the auctioneer announced that there would be but very little sold the next day, Saturday. The question was asked, and he said just to comply with the law they would open. The sale adjourned from Friday until Saturday at 10 o'clock and they sold continuously from 10 to about 2, and the auctioneer announced that the sale would be stopped for the present; the gentleman who made the inquiry if there would be a sale on Saturday was not there.

Q. Were all the goods sold at that time? A. No, sir.

Q. Did they have any other sale? A. Yes, sir; they had three sales after that that I know of. One sale took place on the Monday after the adjournment on Saturday. There was several barrels of molasses, some vineger, some cherry bounce, which is very expensive and cost forty or fifty cents per gallon. I was present when they sold some molasses and some vinegar and I saw the parties when they carried the goods off. There were two pairs of scales sold; there was an empty cracker case, which cost Mallett & Mehegan $2, which, I suppose, was sold. I have had no opportunity of examining the account of sales. On Wednesday of the next week after the sale, there was some tobacco sold. The sales were not announced; the auctioneer got up and went to work. There was some crockery sold on Monday of the second week which had been knocked off to T. H. Gatlin, a merchant. It was sold again. Mr. Williams told me Mr. Gatlin had bought it.

Q. Do you know how much crockery Mr. Gatlin bought? A. I don't know. There were several sets in the store and he bought more than one-half of it, I think. They were 100-piece sets.

Q. Do you know whether it was sold again, of your own knowledge? A. No, sir.

Q. Mr. Gatlin is solvent? A. Yes, sir.

Q. You say some tobacco was sold: why was that not sold? A. There was a lot of tobacco sold on Saturday of the first week; Mr. T. H. Gatlin bought it and it was re-sold. I can't remember the exact number of boxes, but there were ten or fifteen boxes of it. There was some tobacco sold on Wednesday of the second week. I don't know that this was sold before. I know that Latham bought it and paid for it and has it. I don't know the exact price that Gatlin bought at; it was sold afterwards for a great deal deal less than he bought it at. My impression is that the difference was about one-third.

Q. About how much tobacco in a box? A. They vary A box of tobacco is known as a box that will weight 20 pounds or more. These boxes would run from 20 to 45 pounds. When I speak of a box of tobacco I mean it in this sense. On Wednesday a lot of washing powders were sold. It was knocked off to Dr. J. M. Baker for over two dollars per case. It was re-sold for $1, and Dr. Baker bought some of it at that price. He is one of the plaintiffs in this action. I don't know whether he is solvent or not; I don't think he would like to have his solvency questioned. He is considered solvent. There was some smoking tobacco sold; one box contained about sixty or seventy-five pounds. I think it was sold for three or four dollars. I don't remember the purchaser. It was afterwards re-sold and one case sold for $1 and one for 10 cents. This cost $6.50 per case. There was a piece of terra cotta pipe sold the second week.

Q. Sheriff, in his testimony, stated that he sold some molasses on Monday; that you called his attention to and failed to tell him how many barrels; state about it.

(Objection by plaintiffs. Objection overruled.)

A. On the Saturday during the week of the beginning of the sale, the auctioneer, Mr. Williams, Sr., announced that he would sell some molasses. I said to him, "Captain,

some of the molasses and syrup has been allotted to us by the appraisers in our personal property exemptions which we had sold to S. Mallett": that was the identical molasses the sheriff had removed from our store: "if you will let me make a suggestion, I don't want to interfere with your business, I will send to the store and get a sample of each the molasses and syrup, and you can submit that to the bidders for examination, and I am satisfied after they examine it and know what they are buying, that the molasses will bring more money than if you sold it without their knowing anything about the grade of it." I sent Latham to the store of S. Mallett, of course, and directed him to bring a sample of each the English Island molasses and Sugar Drip. Latham brought the samples; I handed them to Captain Williams, and my impression is that he offered the syrup for sale first according to the sample which he had in the bottle. Captain Williams asked me, holding the sample up in his hand, sample of syrup, "Charlie, can you tell me how many barrels there are of this," and I said to him that I did not know, and asked Latham if he would step out in the street where the molasses was and count the number of barrels. He went and counted them and came back and reported to me that there was eight barrels; I told him that he was mistaken—that there must be more than that, and so I went and counted them and counted thirteen barrels of the Sugar Drip. Captain then sold one barrel, with the privilege and continued selling until he had sold thirteen barrels; and after having sold thirteen barrels of syrup, Captain Williams then announced that he would now sell some molasses. Captain Williams then asked me if I could tell him how many barrels like the sample he held. I went out and counted it myself and I counted eight barrels. After he had finished selling the molasses, he then announced he would go upstairs. Now, on Monday after the week beginning the sale, I met Sheriff Knight on the court-house corner.

Q. Up to that time had you spoken one word to him about the molasses? A. No, sir; I had looked for him and could not find him. With Mr. Martin, and in his presence, I said to Sheriff Knight, "Sheriff, when are you going to sell the balance of the goods?" and he said, "I have sold them all." I said to him that he was mistaken. He said that he sold them all Saturday just prior to that date. I then said to him again, "You are mistaken about it, and if you will allow me the use of your inventory I think I can point out to you certain things which you have not sold," and he made no offer to allow me the use of the inventory book. So I then said to him that there was only twenty-one barrels of molasses and syrup sold on Saturday, and I said I know there is a greater quantity than that, because I have counted it. He then said to me, "If I have not sold them I intended to do it." I then said to him, "You have not done so, and, besides that, I am satisfied that there are other things you have not sold; you have a large quantity of flour barrels taken from the store and they are property and are worth something, and you have not sold them." I said, in addition, "Now, besides, there are two pair of scales in the store which was occupied by Mallett & Mehegan at that time, the time you removd the goods, also an empty returnable cracker case, which cost Mallett & Mehegan $2." I said, "You have not sold all of these and they are worth something." He said to me, "You told Captain Williams there was but twenty-one barrels of molasses." I said, "I did not," and went on to repeat to him what I said to Captain Williams as I have here detailed it. He insisted that I did say there was only twenty-one barrels of molasses and syrup, and I insisted that I did not, because I knew what I said. The sheriff became a little animated in his discussion and I turned off and left him.

Q. Right there: You stated that you asked him if he

would let you see the inventory; to what inventory did you refer? A. The one taken by Messrs. Weddell and Pippen.

Q. Did you ever demand of him that inventory? A. Yes, sir.

Q. Did he give it to you? A. No, sir; he did allow me the use of it for a few minutes. After the time above detailed, about 2.30 o'clock on Monday, I was coming over to the court house for the purpose of reading the judgment against Mallett & Mehegan, and I met Henry Cherry, who said to me that Sheriff Knight said come over and show him which was the molasses he had not sold, and I told him to tell the sheriff I was busy then, and as soon as I had finished I would be there. I went into the Clerk's office and took down the Judgment Docket in which was docketed the judgment against Mallett & Mehegan in favor of these plaintiffs, and while sitting there reading it I heard someone come to the door and ask if I was in there, and I recognized it as being the voice of Sheriff Knight, and I answered that I was. He came to the door there and asked me if I would not please come over there and show him which was the molasses which had not been sold. I told him that as soon as I had finished I would, and I went. When I went over there I wanted him to understand, that in complying with his request, we waived nothing about the conduct or management of that sale as carried on, and the one about to take place. He gave me the inventory book and I hunted it up, went round and pointed out to him that which had not been sold; this was about 3 o'clock in the afternoon and the weather was very disagreeable and rainy. Parties were standing under umbrellas; the barrels were not sold while I was there.

Q. It has been suggested here in this trial that if you had asked for these papers and books you could have had the benefit of them; did you ask the sheriff to let you look over your books? A. Yes, sir.

Q. Did he allow you? A. No, sir; some time during the week after the week beginning the sale, I went to the sheriff and asked him if he would not let me; this was before Mallett & Mehegan filed their exceptions to the allotment of the exemptions We made a demand on the sheriff to allow us the use of his inventory, in order that we might select the articles to make up the deficiency which we claimed, and he refused Mr. Gilliam and deputy sheriff came down and tendered book, which Mr. Gilliam said was a copy of that book. This was on the Saturday after we made the exceptions to the returns.

Q. Then you did not get it before the appraisers made their return? A. No, sir; not until after we had filed our exceptions to the returns. Some time during the week, after the beginning of the sale, I went to the sheriff and asked him if he had any objection to my having the use of the auctioneer's book of sales, if the auctioneer had none, and he said no. I told Captain Williams what the sheriff said, and he said I could have it but there were some corrections to be made, and then I could have it.

Q. Did you ever have the account sales? A. I have never seen it.

Q. Sheriff Knight testified that you had made a demand on him for certain books and papers and that he had complied with it; state how that is. A. They were the private books and papers, of no value, and could not be regarded as property.

Q. Did he return your private correspondence? A. No, sir; I demanded it of him during the sale on Saturday; there was a lot of my correspondence in some barrels, and I said, "Sheriff, there are a lot of my books and papers here and you can't sell them for anything, and I demand that you deliver these papers into my possession," but he never gave me any reply.

Q. Do you know what became of it? A. I have seen it scattered about town; a lot of it is on St. James street.

RE-DIRECT EXAMINATION.

By Mr. Blount:

Q. In July, at the time you credited these large amounts to S Mallett for board, etc., prior to that time had she knowledge of the judgment? A. The attachment was issued in October. No, certainly she had no knowledge of it.

Q. She knew about the judgment? A. There was no judgment rendered.

Q. You agreed to the judgment? A. I did; my counsel told us it was the best thing for us to do. The money paid S. Mallett was before the agreement was made about the judgment.

Q. Did she know about the reference? A. I think she did, but not at the time this settlement was made.

Q. Did she make a demand for this settlement? A. Not that I know of; Mr. Mallett settled with her.

Q. You had refused to give your cost mark? A. Yes, sir; the sheriff had no right to it.

Q. You refused to give the combination of the safe? A. Yes, sir; he had no right to it.

Q. He asked you for the combination? A. Yes, sir.

Q. What book was it in which they were trying to work out your cost mark? A. It was the book in which Messrs. Weddell and Pippen took the inventory.

Q. Did I understand you to say that that auction was not continued from one day to another? A. It was not. No announcement was made on Monday.

Q. Are you positive? A. I am stating what I recollect hearing. No announcement was made while I was there.

Q. Do I understand you that any sale took place except the sale following the proclamation, announcing before hand that any sale took place without notice the day before? A. No, sir; I did not state it as a fact; if it was done I knew nothing of it.

Q. You spoke of some parties who bid on goods, among them Mr. Gatlin; do you know whether they tendered the auctioneer the money? A. No, sir; I do not.

Q. It was a cash sale? A. That was my understanding. Latham paid cash. I only know that the auctioneer said he refused to take them.

Q. There were certain articles which you say were not sold; do I understand you to state that they were not sold, or that you had no information about it? A. They were not sold during my presence there. I did not say they were not sold.

By Mr. Gilliam:

Q. Did you not hear O. Williams, Jr., swear that those barrels [were sold] to N. B. Dawson? A. No, sir; he said some flour barrels were sold.

Q. You and Mallett, sometimes one and sometimes both of you, attended the sale? A. Mallett did not go there at all.

Q. Did you assist the auctioneer in making the sale by showing him some of the goods? A. No, sir; the auctioneer asked me some questions and I answered him. Sometimes would not know what the things were, and I would tell them what they cost.

Q. Was that the reason you made a bargain with Arnheim? A. Arnheim knows that I [had] understanding with him for myself.

Q. Did you make it as agent for Latham or for yourself? A. In one instance Arnheim said to me, "Do you want any of those butter trays?" and I asked Tom if he wanted them, and he said if they went cheap enough; Arnheim bought them. I made a bargain not to bid in this instance. I was not there when the fireworks were sold I gave him an invoice of the tinware and left him and Latham there.

Q. Did you have any agreement with him about the

lamp chimneys? A. I don't think so; I gave him the invoice.

Q. You divided the property with Arnheim? A. No, sir; Latham and Arnheim may have done so; I was not present.

Q. You spoke about the inventory; it was the original inventory that you demanded? A. Yes, sir.

Q. Prior to the sale under the execution a book was delivered to you by the deputy sheriff purporting to be a copy? A. Delivered it yourself; I will swear that you delivered the book out of your own hand, though the deputy sheriff was present. I think it was just upon the eve of his departure; he said it was the inventory.

Q. You refused to take it from me? A Yes, sir.

Q. You refused to take it from the sheriff? A. I don't think I did.

Q. Mallett was present? A. Yes, sir.

Q. The sheriff tendered it to him and he refused to take it? A. Not that I know of.

Q. You spoke of never seeing the account sales of the amount of goods sold under the execution? A. No, sir; I said I had no opportunity of examining it.

Q. Have you not had possession of it since yesterday afternoon? A. No, sir; I have not. Mr. Fountain gave it to me about 10 o'clock last night.

Q. At the time of the seizure of the goods by the sheriff, and the removal of them from your store, you were present and all correspondence that you said was personal the sheriff did not take? A. All that I saw; but there was a good deal upstairs in barrels, which was removed while I was not there. All that I demanded on that day he gave me.

Mr. C. B. Mehegan comes forward and desires to make the following statement:

"I want to correct my testimony as to the sale on Wed-

nesday, November 20. My impression is that I stated that the sale on that day continued from 10 to 12, or a little thereafter, whereas, it is a fact that the sale began at 10.10 and adjourned at 10.30 to the next day, November 21; it continued only twenty minutes on the 20th and only a few articles were sold; it was circus day. Now, as to my testimony relative to bidding on goods that were sold there, I would like to correct that by saying that bids were made by me for other parties, upon their instructions, and among those I remember Mr. James Pender, the stenographer."

By Mr. Blount:

Q. What day did you start from here North? A. It was on Tuesday morning, December 10, 1895, if this calendar is right, and I think it is.

Q. I asked you some questions in regard to the shipment of some goods from September 27 to October 7, to E. T. Roberson, Robersonville; T. H. Parker, Rocky Mount; S. W. Bell, Kelford; M. H. Owens, Williamston, and H. H. Ward; did I understand you to say that you collected the money? A. They were separate transactions. I was not asked anything about Ward.

(Defendants object, upon the ground that the witness has been asked about these matters.)

Q. I understand you to say that you knew of no such man at Kelford as S. W Bell? A. None that I know of.

Q. Do you know of such a man? A. Yes, sir; he lives in Halifax County.

Q. What was your purpose in shipping a bill of goods to S. W. Bell, at Kelford, when the man did not live there?

(Defendants object, because the purpose that the witness had in making the shipment can not affect the issue involved. The defendants make no objection to the plaintiffs asking what became of the goods, or any question tending to show that the goods are now in his possession.)

A. I have no explanation to make in regard to that. I packed the goods and shipped them.

Q. What purpose had you in shipping these goods to S. W. Bell, Kelford, when there was no such man there? A. My intention was, if Dr. Baker accepted the proposition which we intended to make him, and which we did make, to borrow the money and conduct the business without crippling Mallett & Mehegan; this applies to all the goods shipped. I say that it was my purpose and intent that when I shipped those goods down there, that in order to comply with the proposition which I intended to make Dr. Baker, and which I did make, to dispose of some of the goods to comply with the proposition to prevent the crippling of the business of Mallett & Mehegan. Of course we had to borrow the money, and to continue business it would be necessary to dispose of the goods.

Q. How did it enable you to do this by shipping them to an imaginary person? A. It was my intention to follow the goods and sell them to the best advantage.

Q. What did you ship them to an imaginary person for? A. I have no explanation to make. If anybody else knew the parties were not bona fide I did not know it.

Q. Why did you ship them to imaginary parties? A. It is my experience that when a man becomes cramped in Tarboro, he can not dispose of goods to advantage.

Q. Did you not expect that a judgment would be taken against your firm at October Court? A. If he refused to accept the proposition I made it would be unavoidable.

Q. He rejected your proposition? A. He notified me Saturday, October 12, about 12 o'clock, after the attachment had been served and the safe broken open and the contents removed, that he declined to accept it.

Q. That proposition was less than the amount agreed upon? A. The proposition was that the report of the referee should conform to the amount I offered.

Q. Your proposition was to reduce the judgment? A. Yes, sir.

Q. Then you expected some sort of a judgment against you? A. Yes, sir; I knew the firm was cramped and could not meet the judgment.

Q. Is it not a fact that you shipped the goods off to avoid an execution? A. No, sir.

Q. You were not trying to defeat the collection of a judgment which might be gotten against you in the event you did not agree? A. No, sir.

(The defendants object to this entire line of examination and testimony.)

Q. Did you account to the firm for these goods? A. I sent Latham to Kelford and told him that, as these goods were not attached, I had a right to sell them and to go down and sell the goods or such as he could, and bring me the money, and to ship the balance to Tarboro. He went there and sold a sack of coffee, for which he gave me the money. From the proceeds I paid the freight, and, I think, his expenses down there. The balance of those goods I think were shipped to Tarboro; they were afterwards shipped from Tarboro to Greenville. The goods in Rocky Mount I had shipped to Bethel and sold them to a man named Blount for $53, and he paid me and I spent the money. In Robersonville I sold eighty-five or ninety dollars to a man named Roberson, got the money and spent it. A part of the goods shipped to Williamston I sold to a man named Blount, a sack of coffee, I think. He paid me and I spent the money. The balance of the Williamston goods were shipped to Bethel and I sold them to H. T. Latham for $25, and he paid me his own money and I spent it. The balance of the goods in Greenville I sold for $50 to H. T. Latham, and he has them. They were my goods and my money, and I sold them

Q. Then you did not account to the firm? A. No, sir;

I told you what I did with the money. As to the goods shipped to Ward, I had an order for those goods and the order was in my store: the goods were shipped and he gave the acceptance.

Q. Did you know a man named E. T. Robinson? A. No, sir.

Q. You did not expect him to get the goods? A. No, sir.

Q. Did you go down to the post-office at Robersonville and get a letter from the office for E. T. Roberson?

(Objection by defendants, because that matter has been gone into before.)

I ask you if you did not go to the post-office and obtain a letter from the postmaster, a letter addressed to E. T. Roberson? A. I may have: I don't remember.

Q. Did you break it open? A. I don't know that I got the letter.

Q. Did you go there and have a conversation with the postmaster, and he refused to give it to you—a typewritten letter with the card of Gilliam & Gilliam on the envelope? A. I don't know a thing about such a letter.

Q. You don't deny getting a letter with the card of Gilliam & Gilliam on the envelope? A. I don't know anything about it: I don't believe I got it.

Q. Do you deny that you went to the post-office and asked for a letter addressed to E. T. Roberson? A. I have no recollection of getting any letter with the card of Gilliam & Gilliam: I don't know positively, but I do not remember.

Q. You would remember it if you had seen it? A. I don't know whether I would or not under the circumstances.

Q. Do I understand you to say that you do not remember getting a letter with the card of Gilliam & Gilliam on it, or a letter to E. T. Roberson at all? A. I don't re-

member: I did write a letter to E. T. Robinson myself, and may have gotten that. I don't remember going to the post-office.

Q. Did you send anybody to the post-office to get a letter addressed to E. T. Roberson? A. Not that I recollect.

Q. Was a letter addressed to E. T. Roberson delivered to you by anybody else than the postmaster? A. I don't remember whether there was or not.

At the request of Mr. Blount, the foregoing answers, together with the respective questions, are read over to the witness, and no objection made as to their correctness.

Q. Will you tell the Court what purpose you had in writing a letter to E. T. Roberson, when you knew no such man lived there? A. I don't know that I had any purpose at all in it except as a bill to go by. That was what the letter contained. It is the only letter I ever wrote him.

Q. Why did you write a letter to a man that did not live there? A. I have no explanation to make except what I have said.

Q. Did you ever get that letter back? A. Not that I know of.

Q. Was it returned to you by the Post Office Department? A. I don't recollect getting the letter back at all.

Q. Was the name of Mallett & Mehegan on the outside of the envelope you wrote to E. T. Roberson? A. My impression is that it was not, as at that time we did not have any printed stationery, except invoices.

Q. I understood you to say the other day that you had consulted your lawyers; I think you mentioned Judge Connor, about certain board you owed S. Mallett, and he advised you that, if you were indebted, you had a right to pay it? A. I did not testify to that. I testified that I sent for Judge Connor to have a talk with him about matters relative to the referee trial, and after I had finished

talking with him, I heard Mr. Mallett say to him that we owed S. Mallett some board and that he stated the amount, and asked Judge Connor if he had a right to pay it, and he said yes, to pay it. I did not know that we owed her; I thought, from the appearance of the account, that it was about evenly balanced; I told Mr. Mallett that if anything was due to pay it.

Q. Do you know how long after that before the credit was entered to S. Mallett on page 717? A. So far as I know Mr. Mallett may have done it at that time, and asked Judge Connor if it was right; I did not look at the books.

Q. When did you first have any contract with S. Mallett about your board? A. I had a contract with her from the time I had been working for myself. I paid $16.50 for board and lodging up to January 23, 1890, and since that time I was to pay, and have paid, $17.50 per month for board and lodging. Mallett & Mehegan were to pay $17.50 for Latham.

Q. Look at page 717? A. There is a mistake of $2.50 in the entry of board. In the other item there is a mistake of $5. I did not make the entry.

Q. On Latham's individual account the firm charged him with $150 board? A. That was a mistake and was charged off again, as appears by the books.

Q. In the matter of your exemptions, do you remember who the appraisers were? A. I was not present at the time the exemptions were laid off and appraised.

Q. You have appealed from the allotment? A. Yes.

Q. On the ground that you were charged too much for the goods? A. Yes, sir; Mr. Mallett has appealed, too.

Q. Why did you charge Latham with $150 board if it was more than that? A. I didn't charge it.

(The plaintiffs put the ledger of defendants in evidence.)

Q. In your statement made in January, 1894, there was an estimate of some open accounts at $4,700? A. I did

not estimate any accounts; I distinctly stated that those accounts were down at their face on the books.

Q. There was such an item? A. Yes, sir.

Q. Did you include in this the account against S. Mallett? A. No, sir; the amount of the debts was the amount Mallett & Mehegan owed North; S. Mallett's account was not included in the amount; I did not include it because I thought it would balance up.

Q. Was it included in your solvent credits listed last June? A. It was not.

CROSS-EXAMINATION.

By Mr. Fountain:

Q. Why did you not include the S. Mallett account in listing your taxes? A. Because, without adding it up, I thought it would equally balance.

Recess until 2.30 p. m.

Hearing resumed at 2.30 p. m.

CROSS-EXAMINATION.

Q. You worked for Mr. Woolard a number of years, did you not? A. Yes, sir; about ten years. I finally became his confidential clerk and trusted manager of the business.

Q. After Mr. Woolard's death and the qualification of Mrs. Woolard as administrator, on the 25th of January, 1890, you and Mr. Mallett borrowed some $6,600, including money and stock, from her, did you not? A. I do not remember the amount, but that is about it.

(Objection to answer.)

Q. The contract between yourself and Mallett and Mrs. Woolard was a continuing contract, and the money to be loaned for four consecutive years, provided you gave a general exhibit at the end of each year as to the sound condition of your business, was it not?

(Objection to answer.)

Counsel for appellants asks counsel for appellees the object of the testimony. Counsel for appellees states that the purpose of the testimony is to impeach the credibility of the witness, and to show his animus in his persistent purpose to defraud the estate of M. L. Woolard and to thwart them and delay them as far as they can in realizing on the judgment that they hold against Mallett & Mehegan.

(Counsel for appellant objects to the question and answer, for the purpose above stated, for that it does not tend to show what appellees' counsel contends.)

A. That contract is a contract between Mrs. Woolard and Mr. Mallett and myself, and whatever is in that contract shown to me is the contract that we signed. I have no further answer to make to that question.

Q. Do you swear that you do not know the terms of that contract in the particulars stated? A. The terms of that contract are expressed in the contract, and whatever is expressed in there is the contract.

(Counsel for appellant asks counsel for appellee to present witness with contract for inspection to enable him to answer any specific questions in regard to contract.)

A. I will answer your question by reading the terms of the contract. "And it is further agreed that the said loan and renting shall be renewed on the 1st of January, 1891, and on the 1st of January for the next three years thereafter, with only the modification that the rents shall be increased January 1, 1891, to $500, and so continue for the next four years, provided on general exhibit each year at the time of renewal it shall appear that the business of the said firm is in a sound condition."

(Objection to the testimony by the appellant.)

(Counsel for appellant asks that if part of this contract be put in evidence that the entire contract be put in evidence here and marked as the referee shall designate.

Counsel for appellee offers no objection. Contract marked Exhibit "A.")

Q. When did Mrs. Woolard die? A. She died in 1893, on the 30th day of September, I think.

(Counsel for appellant objects to all questions and answers in regard to dealings, contracts not connected or have no bearing upon the case at issue, alleging the above as being of that nature.)

Q. In January, 1894, Dr. Baker and Miss Adams, administrators, requested of you a statement as to the status of your mercantile affairs, did they not, under the above contract?

(Objection to the answer.)

A. Some time during the month of December, 1893, I received a communication from Dr. Baker, or Dr. Baker and Miss Adams, administrators of the Woolard estate, asking for this statement.

Q. In consequence of their request, what did you do? A. Took an inventory of all the assets of the firm of Mallett & Mehegan, and a statement of their Northern liabilities.

Q. Did you make oath to that statement? A. Yes, sir; my recollection is that it was before the Clerk of the Court.

Q. In this inventory you represented the firm of Mallett & Mehegan to be worth $17,000 over and above liability, not including their indebtedness to M. L. Woolard and represented in said inventory your stock of goods in Tarboro business at $5,675; your stock of goods in business at Coakley worth $1,400; cash money on hand, $4,400; mercantile accounts reasonably worth $4,700; notes, mortgages and other securities reasonably worth $2,000, and that your liabilities, other than the Woolard debt aggregated $2,000? A. I did not make any such statement as contained in your question. In referring to the liabilities I stated it was only Northern indebtedness.

(Counsel for appellant, it appearing that the statement in question was rendered to appellees, demand of counsel for appellees the statement in question to be submitted to the Court in evidence. The appellee states that such an inventory was before Thos. H. Battle, Referee, and was taken from the court papers by some one other than the appellees, and that appellees have not the original statement, nor a copy thereof. Counsel for appellants asks counsel for appellees if that is the only statement he wishes to make about it, and he answers "Yes.")

I want to state that this statement that Mr. Gilliam is referring to, was prepared by taking an inventory of the goods and merchandise belonging to the firm of Mallett & Mehegan, both at Tarboro and at Coakley, and my recollection is that it was a statement of the book accounts as they appeared upon the books. My recollection is that it did not include the book account of Mrs. Woolard. The money that was mentioned in this statement was the actual amount of money we had on hand, that I knew was right, the amount I do not remember though. As to the statement of notes and mortgages, there was some deduction made from those, and the whole statement, as a whole, was a statement of the nominal assets of the firm of Mallett & Mehegan, less the amount of Northern indebtedness that they owed. I gave the statement to Mr. Don. Gilliam and it was here at the referee's trial before Thos. H. Battle. I was examined upon that statement and the testimony was taken by Mr. James Pender, and Mr. Don Gilliam had a copy of that testimony.

Q. Do you swear that Mr. Gilliam had a copy of the testimony relating to your examination about this statement? A. Yes, sir.

Q. Do you swear that you saw in Mr. Gilliam's possession a copy made for him or for his clients? A. I do not know who it was made for, but it was certainly in his

possession, and it was not my copy at that time; I had a copy afterwards. I do not know where my copy is.

Q. Do you recall the aggregate amount of your statement? A. I do not.

Q. Was it not in excess of $17,000, without any deduction of the gross amount? A. My recollection is that it was.

Q. In that statement the only liabilities that you mentioned was the Northern liabilities of $2,000? A. That is my recollection.

Q. That statement was prepared to give Dr. Baker a true insight as to the condition of your business, was it not? A. It was not for that, anything of the kind. It was prepared to give him a general idea.

Q. Was not your purpose, and was not the paper prepared, calculated to deceive Dr. Baker, and did not it deceive him? A. It was not intended for any such purpose.

Q. Why did you not, in seeking to give Dr. Baker a statement of your business, mention your local liabilities, other than the Woolard debt? A. For the very reason that on the 1st day of January, when we were called upon to furnish this statement showing the condition of the business of Mallett & Mehegan on that day, we started to work early in the morning and worked as rapidly as we could all day, and you and Dr. Baker came in before this inventory was finished and said you would not accept any inventory of any kind and no statement of any kind we could prepare. We did not have time to prepare it. The home liabilities of Mallet & Mehegan at that time, exclusive of what they owed Mrs. Woolard, was very small; what the amount was I do not exactly remember, but we did owe money here in town. It amounted to probably $1,500, not to exceed $1,500. That is my recollection.

Q. Your liabilities, other than the Woolard debt, were

$1,500 local, $2,000 foreign, estimated? A. I am satisfied they would not exceed that.

Q. When you were examined before the referee in respect to that statement made to Dr. Baker, did you not expressly refuse to answer that question, and, in consequence thereof, were you and your attorneys not forced into a settlement? A. No, sir; he did not ask me that question. I answered every question that was asked me concerning that statement.

Q. Didn't you refuse to answer the question as to whether or not your business had been in a prosperous condition since the making of that statement? A. That is the question I did refuse to answer.

Q. Upon your refusal and after consultation with your attorneys, you and your attorney, Mr. Martin, before Mr. Battle as referee, agreed to a compromise judgment? A. We agreed that the referee should report that Mallett & Mehegan were indebted to the plaintiffs in a certain sum. The papers are in court and show for themselves.

Q. I ask you the question, if, in your judgment, your business was from the time of making that statement up to the trial before the referee, Mr. Thos. H. Battle, in a prosperous condition? A. I shall not attempt to answer that question, as I have none of the books nor any memoranda. I will answer this question, that I know of my own knowledge that after the inventory was taken of those goods at the Coakley store we opened a store at Old Sparta and continued the business over twelve months and lost money there, $500 or $600. I know that. The store that was opened at Old Sparta we sold out to Mr. J. A. Warren in 1895, and we took an inventory of the goods and made a statement of the goods, and that is the reason I know this.

Q. Do you know whether or not you lost money in your Tarboro business between the 1st of January, 1894, and

the hearing before Thos. H. Battle, Referee? A. I think that we did, but I don't know.

Q. Can you give us any idea of about how much? A. I can not.

Q. Did not Dr. Baker propose that a disinterested expert accountant make an inventory called for under the contract, which Mallett & Mehegan refused? A. The only recollection I have about anything that might be considered as a proposition was a demand for the same on the 1st day of January, 1894, when you and Dr. Baker came down there. He said that he would refuse to accept any statement that we might make ourselves. I suppose he was acting under their contract when he demanded the statement. I was present that morning.

Q. When suit was ultimately brought on this debt for $6,000, you set up the plea of the statute of limitations? A. I did, sir.

Q. Before the institution of the suit you filed statements, as agent for Mrs. Woolard, showing the payment of some $2,000 to Mrs. Woolard by yourself and Mallett on this contract, did you not, and after the suit was brought, in order to avail yourself of the statute of limitations, you filed a supplementary report, showing that these credits had not been made? A. Yes, sir; but not to avail myself of the statute of limitations. It was a fact that money had never been actually received by myself as Mrs. Woolard's agent, and no settlement had been had with Mallett & Mehegan by Mrs. Woolard.

Q. Both statements were under oath by yourself? A. Yes, sir. At the time this statement was filed with the Clerk of the Court, Mr. Ed. Pennington, I called his particular attention to those two items, and I told him that I had never received that money and never had a settlement with Mallett & Mehegan, and that Mrs. Woolard was sick in Washington, and as soon as she returned I could settle

with her, and these two items would be all right. As a matter of fact, I never had any settlement with Mrs. Woolard, because she was sick and she never got well. I never saw her from the time of her arrival here.

Q. In your answer to the suit of the administrators you also claimed some $3,000 for your services, did you not? A. The amount I do not remember, the papers will show whatever it is.

Q. At the time of entering the consent judgment before Mr. Battle, I ask you if it was your purpose to pay the same? A. Yes, sir; as far as my ability would allow.

Q. When did you change your mind about this? A. Of course I did not propose to forego my constitutional rights in order to pay the debt; did not care to do anything of the kind.

Q. Have you turned over to the administrators all of your property other than your constitutional exemptions? A. Yes, sir; the sheriff took it; I did not turn it over to them.

Q. State if you did not, between the 1st and 10th of October, 1895, prior to the October Term of Court, which convened on the 11th inst., ship more than $1,000 worth of goods belonging to Mallett & Mehegan to Robersonville, Williamston, Rocky Mount, Kelford, to fictitious persons? A. I did not, sir; not more than $1,000 worth of goods.

Q. Did you ship any? A. I did, sir. These goods were shipped to the order of Mallett & Mehegan. That is the blotter of Mallett & Mehegan, and that is my handwriting. They were marked to those parties and shipped to the order of Mallett & Mehegan. Above them is written "Verbal Order," and I wrote it myself; but they did not amount to $1,000: $183, account of E. T. Roberson; $148, account of T. H. Parker; $165, account of S. W. Bell; $129, account of W. H. Owens—total, $625.

Q. Were there any other goods that you know of disposed of in like manner? A. No, sir; there was not.

Q. State if, as a matter of fact, you did not sell your goods along and during the first weeks of October, 1895, at and below cost, in order to dispose of them. A. No, sir. The only thing I remember that I sold at or below cost price was some damaged tobacco.

Q. State if on the morning of the attachment by the sheriff of your property you did not bestir yourself to make collection on all accounts due you? A. No, sir. I collected some and I had a right to do it. The accounts were not garnisheed. I put the money in my pocket, and I had a right to do that. It was before my personal property exemptions were allotted.

Q. Have you collected any money due the old firm of Mallett & Mehegan since your exemptions were allotted? A. I have, sir. I did not turn it over to the administrators. I used it in paying the indebtedness of Mallett & Mehegan.

Q. About the 1st of October you and Mr. Mallett had a settlement with your sister, and Mr. Mallett's wife, in which settlement you paid Mrs. Mallett some $1,800; didn't you? A. We paid her some money, but not $1,800; I don't recollect how much we paid her. My recollection is that it was something over $1,000. It was paid to her during the year 1895, but not in October.

Q. I ask you if the payment to Mrs. Mallett was not made in the month of July, made after the hearing before Battle, Referee? A. I don't remember the date, but it was sometime during the year 1895.

Q. I ask you if with this money that you paid Mrs. Mallett she did not buy yours and Mr. Mallett's personal property exemptions? A. She paid us $100 on the price of the exemptions and gave her note for the balance.

Q. I ask you if immediately after your store had been closed and your exemptions had been allotted, if you did not go North and buy a bill of goods for Mrs. S. Mallett?

A. No, sir. I bought some goods for Mrs. S. Mallett, but it was not immediately after the goods were allotted. It was in December, 1895.

Q. Can you give about the amount of these purchases? A. I can not give them to you, for I do not remember the amount. The papers show. I can give my impression about it. It know there were not $2,000: there were not as $1,500, I think.

Q. At the hearing before the referee, Thos. H. Battle, Judge H. G. Connor and Mr. John L. Bridgers and Mr. L. C. Latham were your attorneys, were they not? A. Yes, sir.

Q. After that did not Judge Connor refuse to aid you, or to have anything to do with your suit? A. He did not, sir: we never said anything to him about it.

(Entry by referee, by consent of the parties, that all of the foregoing questions and cross-examinations and answers were objected to by appellants' counsel, as being irrelevant to the question at issue, except as to the plea of the statute of limitations, and the question as to shipping goods to fictitious persons, which appellants' counsel do not except to, for the purpose of impeaching or tending to impeach witness only.)

Q. Prior to the institution of the actions brought against you by Mrs. Woolard's administrators, didn't you go to see one of them, Miss Adams, one night? A. Yes, sir.

Q. And try to get her to sign a paper providing for a settlement of all this threatened litigation?

(Objection.)

A. I never asked her to sign any statement. I did not ask her to sign any paper, and never have asked her to sign any paper of any kind. Never had a paper for her to sign.

Q. Didn't you tell her that if the matter was not settled

that you would fight the thing interminably? A. I did not tell her anything of the kind.

(Objection.)

Q. Where were you at the time that allotment of the personal property exemptions were made to Mr. Mallett? A. I don't know exactly where I was, but I was out of town. I did not know they were to be allotted that day.

Q. Did you make any effort to be present before the appraisers or exhibit any wish to be present? A. No, sir. I got Mr. Mallett to select my exemptions whenever they got ready to allot them.

D. Did you tell Mr. Mallett to furnish them with any information as to the value of the goods, or anything of that kind? A. No, sir. I only told him to select certain articles as my exemptions.

Q. How did you get all these invoices that have been introduced by you and all that information about the per cent of the then value of new goods; how did you procure that? A. I got those original invoices for the goods from among the invoices of Mallett & Mehegan that I had preserved. These were the original invoices for the goods. I wrote for quotations and prices on new goods at the time of the allotment to quite a number of houses.

Q. In regard to this sugar, No. 1, given at the figure of $31.74 instead of $34.56; that is just by calculating at what price the sugar could be bought at wholesale price? A. That was the price of it on that day. That was the price that I could buy it for. I do not think we could have sold those two barrels for $34.56 out here in town.

Q. When sugar is bought by a merchant that way, do all merchants make contracts on the basis of the deduction of all this per cent? A. I am unable to answer for any one except Mallett & Mehegan, but I know they had it to do.

Q. Of this stock of goods, all the articles except those

allotted as personal property exemptions were sold by the sheriff? A. The sheriff took possession of them, but all were not sold. I guess what became of them is a question for the sheriff to answer. Most of them were sold.

Q. What became of the goods that were not sold by the sheriff? A. I must decline to answer that question. I have some knowledge about them.

(Objection to these answers.)

Q. In regard to this first flour, No. 2, at $4 per barrel, do you mean to say that flour could not have been sold for $4 per barrel on that day? A. I do not think it could, because it was old flour, made out of old wheat.

Q. Were you able in every instance to say with certainty as to each article that it was included in this or that particular invoice? A. Those invoices which we have referred to Mr. Battle, as being the original invoices for the particular goods, or that we were talking about, were the original invoices of my own knowledge. I had the invoices there; I did the buying and know all about it.

Q Did Mr. Mallett sell his personal property exemptions to his wife, and you sold yours? A. Yes, sir. I gave her a bill for the goods but do not remember the exact price. I do not recollect what the amounts were, but the invoices were filed in the supplementary proceedings. The amount of Mr. Mallett's exemptions sold out to Mrs. Mallett was $367.08, including everything except eighty cents in money.

Q. How do you [know] that was the value of sugar at that time; what do you base your statement on? A. I base it on the market price of sugar at the time it was allotted. I arrive at the market price as I did in buying goods.

Q. Did you write and get information about it? A. No, sir; I did not write and get information about that sugar, but I got this quotation here, which is a quotation

by which I was always guided in the purchase of sugar. I got it from the Wholesale Grocers' Association: it came to us regularly. Mallett & Mehegan received these quotations every time there was a change in the market price in sugar. The price of sugar fluctuates. On the day this sugar was allotted the quotation was the same then as this quotation here, November 1, 1895.

Q. On what quantities was that quotation? A. In jobbing quantities; 25 barrels is the minimum of jobbing quantities. I did not ask the jobbing price in every instance, though I did so in the case of sugar.

Q. Two barrels ordered that day from Norfolk or Baltimore shipped down here would have cost more than the figures you gave, would they not? A. Yes, sir; with freight added. It would not have cost as much as they valued it at, for the reason that these rebates were divided by these jobbers who bought twenty-five or one hundred barrels and the merchants who would buy two, three or five barrels.

Q. Your calculations of all these items are based upon those sales of manufacturers and jobbers to you? A. Yes, sir.

Q. To these amounts have you added freight rates? A. Yes, sir; to those to which freight should be added: some were sold delivered. I could buy three, five or fifteen barrels at the same price.

Q. Could you buy the small proportions that were allotted to you on the same basis that you could the larger quantities? A. I could have bought the quinine at the same price named in the price list, but there are articles that could not have been bought in the same way. The basket could not have been bought singly at the price returned by the assessors.

Q. In basing your calculations you calculated from a basis on the number you originally bought on the bill,

irrespective of what one barrel would have cost you in being put in single quantities? A. Yes, sir.

Q. Can you tell us what was the value of Gail & Ax strong snuff, No. 10, at the time of the allotment, not excepted to?

(Objection to answer.)

A. My recollection is that the snuff is put down at about what it cost. I can, however, produce the original invoice for it; the original invoice was for a larger quantity than is down there.

RE-DIRECT EXAMINATION:

Q. You were asked if you did not plead the statute of limitations when this action was brought, that is the original action, under which these personal exemptions were assigned to each of you, and you said you did. State if the statute of limitations that you plead was not in an action on a note given by Mallett & Mehegan to Mrs. Woolard? A. Yes, sir. Immediately after the death of Mrs. Woolard, which occurred on September 3, and at the time of her death, I was sick, and I think about the 3d or 4th of October Dr. Baker made demand, after he qualified as administrator, upon Mallett & Mehegan for a statement of Mrs. Woolard's account immediately. The account was of such a lengthy character, it had been running for three years and eight months, that the account could not be prepared immediately. My recollection is that it was on the 4th of October, and on the 5th of October he came down again and made demand to have the account made out; he demanded to see the books, which were shown him. The next day, or about two days thereafter, he said he would not pay any account that we had against Mrs. Woolard. On account of that, before suit was instituted against us, we employed Mr. John L. Bridgers and Judge Connor. We related the circumstances to them and they advised us to plead the statute of limitations.

Q. You were asked if you did not go to Miss Rose Adams, the co-administrator with Dr. Baker, and ask her to sign a statement, which you denied doing? A. I went to see Miss Adams sometime in January, I think, and had a conversation with her, and during the course of the conversation with her I related to her the attitude assumed by Dr. Baker, and told her about his denying this account and refusing to pay it, and related everything, his entire conduct, his demand for the statement, and his refusal to accept it, etc., and I told her that in order to satisfy her that the account which we had against Mrs. Woolard was correct, to show that the books were straight and kept all right; that I would bring the books around so she could examine them for herself; that on account of the steps taken by Dr. Baker it looked as if we would have a lawsuit, and I did not see any necessity for it at all, and that in the event he still insisted upon his position, we would certainly stand upon our legal rights and the matter would result in an extended litigation and useless expense on both sides.

Q. You were asked if you did not ship certain goods to fictitious persons; state why you shipped the goods, the object of the shipment. A. The goods were shipped for the purpose and in order to raise money so as to continue our business and to execute the proposition which we had made up our minds to make to Dr. Baker, and which we did afterwards make. The proposition in writing made to Dr. Baker, I do not remember exactly.

Q. You and Mr. Mehegan were merchants in the grocery business in the town of Tarboro at the time of and prior to the allotment of these homestead exemptions? A. Yes, sir.

Q. These goods that were allotted were a part of the goods belonging to that firm? A. Yes, sir.

Q. You state that this sugar at the quotation which you

have based your calculation was a jobbers' lot, but that even as small a lot as two barrels could have been bought at less than the price at which it was allotted to you. Do you know what sugar could have been bought for from either F. S. Royster & Co. or Lichtenstein at this time? A. I can not answer this question of my own knowledge. I know I have bought sugar from them at a profit of 25 cents per barrel, after taking off those discounts.

(Objection.)

Q. As to the flour, you say you could have bought that in smaller quantities at the price you made your calculation? A. Yes, sir.

Q. How is it that with regard to the other objections here, such as snuff, soap, etc.? A. That was in jobbing quantities.

Q. State if the price put upon these goods in the quotations upon which your calculations are based, in your judgment, is a fair and just price for the goods, and the class of goods assigned to him at the time they were assigned. A. Yes, sir.

CROSS-EXAMINATION OF J. P. MALLETT:

Q. On hearing of this matter, brought before Clerk of Superior Court, you swore you had no knowledge, direct or indirect, of the shipment of goods to fictitious parties at Rocky Mount, Robersonville, Kelford and Williamston; did you not?

(Objection.)

(Purpose of question to impeach witness.)

A. Don't know what I testified to at preliminary hearing; has been so long. Remember that they handed me counter book and asked if it were my handwriting, and I replied it was not.

Q. Do you recall whether you knew that shipments had been made?

(Counsel for appellee hands the witness a paper-writing, stating it to be evidence before Clerk of Superior Court, to which counsel for appellants objects, because there is no evidence that it is evidence.)

Reads as follows:

"Do you know anything of following sales of goods: E. T. Roberson, October 4, Robersonville, $185; Orren James, October 3, town, $33.19; T. H. Parker, Rocky Mount, $148.77; S. W. Bell, October 7, Kelford, $168.51; W. H. Owens, October 9, Williamston, $150; H. H. Ward, September 27, Rocky Mount, $52.83; Orren James, October 4, town, $32.79"—to which questions he replied to aforesaid Clerk: "I know nothing about those sales. Entries are not in my handwriting. I know nothing of transactions."

And further question: "Do you know whether any of those items had been collected?"—to which you answered, "I do not."

Q. Was such a question asked you before Mr. Pennington while on oath, and did you make reply indicated?

(Objection.)

A. When the counter [book] was handed me and these sales were pointed out (to the best of my knowledge), my reply was that I knew nothing about these sales; they were not my entries.

Q. Does the question written out in full represent the question asked you and the answer thereto? A. Yes; something on that order. Have seen a copy to that testimony.

Q. Did you know anything about the shipment of those goods when you testified before Clerk Superior Court? A. I don't think I was asked about the shipment of those goods; was asked about the sale of them.

Q You were sworn to tell the whole truth, were you not? A. Yes.

Q. Did you do it about this transaction? A. To the best of my knowledge, I did. I think I told the truth.

Q. Don't you know whether you told the truth? A. Yes; I think I told the truth.

Q. State if when you were examined before the Clerk of Superior Court, in respect to sale and shipment of these goods, you had not been to Rocky Mount in person to see railroad authorities at that place to have the goods shipped [to] some other point.

(Objection.)

(Counsel for appellants states the objection to the question is based on the ground that counsel for appellees has stated the object of the examination was to impeach witness. It is in testimony that the question about shipment of goods in question was not asked witness before Clerk of Superior Court; therefore can not have a tendency to impeach witness.)

A. I had been to Rocky Mount, but whether it was prior to this examination, or not I can not recollect. The shipment and sale of those goods was not made by me. I was instructed by my partner to go to Rocky Mount and sell them or to ship them back here, which I did. Shipped them back, to the best of my knowledge and belief. Sale and shipments were not mine.

Q. Do you swear that you don't know whether you went to Rocky Mount between date of shipment, about 1st [to] 7th, 1895, and date of hearing before Clerk, January, 1896? A. I went to Rocky Mount sometime between that time, as I said before.

Q. Did you have any knowledge or information of shipment of these goods at time of shipment or prior thereto? A. I had no accurate knowledge. They were not sold by myself. I afterwards received information through Mr.

Mehegan that these were at Rocky Mount. He asked me to sell them or have them shipped back.

(Questions repeated.)

A. No, sir.

Q. What do you mean by accurate knowledge? A. I mean by accurate knowledge assisting in packing, marking and selling goods.

Q. Do you mean to say that your partner, without your knowledge or consent, or without acquainting you with his purpose, made shipment of these goods? A. He did not consult with me about it.

Q. Did he tell you that he was going to do so? A. No, sir.

Q. When were you first acquainted with what he had done? A. I knew that he was packing some goods, but I asked no questions. He made the sales, packed the goods and attended to it himself. I don't recollect any date. Prior to attachment, but as to sale and shipments I had no absolute knowledge, but only observation.

Q. Why did you not make this explanation to the Clerk when you were sworn to do so? A. At the time the question was asked me before the Clerk the book was handed me, and my reply was that I knew nothing at all about sale or shipment of those goods, or words to that effect.

Q. When you went to Rocky Mount about those goods, did you not see Mr. Spencer Fountain? A. I did.

Q Did not Mr. Fountain decline to deliver goods or to re-ship them to your order because you did not have bill of lading? A. My recollection is that I went to warehouse and asked about this special shipment. He told me that it was there. Afterwards I got bill of lading, delivered it to him, re-marked the goods and shipped them, I think, to Tarboro. I don't recollect whether he declined or not, but he said something about bill of lading attached, and I produced bill of lading.

Q. You heard Mr. Mehegan examined before the Clerk? A. I think I did, sir.

Q. The Grand Jury found a true bill against you for perjury, did it not, Mr. Mallett? A. I don't know of my own knowledge; I have been told that they had.

Q. Were you arrested under copies? A. I don't think I was.

Q. When you were called to be tried for perjury the bill was quashed, was it not? A. My impression is that no true bill for perjury has ever been found against me in this county.

Q. Do you mean to say that you do not think that a true bill of indictment for perjury has ever been found against you in this county? A. My recollection is that there has not been a true bill found against me in this county. I have been informed and believe that certain parties have made strong efforts to produce a true bill against me, but I have never been arrested under copies that I know of.

Saturday Morning.

Last night in my testimony in regard to the bill of indictment I had overlooked entirely and forgotten the circumstances. Since then I recollect that I was arrested; that I was arrested and Mr. Shackelford stood my bond for appearance at court for perjury. That the bill of indictment was quashed on account of one of the jury not having paid his taxes, or something like that. Last night I had forgotten all about the circumstances through the excitement.

Q. These papers are the bill of indictment and copies against you? A. I do not know, sir; but last night I had forgotten all about that; it escaped my memory altogether; but afterwards, thinking it over, it came to me.

Q. You stated very positively several times that certain

parties had tried to, but had never succeeded? A. I was excited and had lost sight of it entirely: my intention was not to do anything wrong.

Q. Why did you refuse to give any information or assistance to the appraisers; why did you refuse to tell them your cost mark or to furnish them with invoices, or anything of that kind?

(Counsel asks the purpose of that question. To show the animus of the witness in regard to this whole thing; to impeach the witness. Counsel for appellants states that they object to the evidence for any other purpose except as a question for the purpose of tending to impeach the witness.)

A. The sheriff had been to Mr. Mehegan and myself: had made demand for our cost mark prior to this, and our counsel advised us not to give it to them: that is the reason I refused. They did not ask me for any invoices that I know of.

Q. Do you state positively that the appraisers did not ask you for any invoices. A. No, sir: I do not know. I am not positive whether they asked me for invoices or not.

Q. If they did ask you to show them your invoices, you refused to do so, didn't you? A. I refused to give them my cost mark, but about the invoices I have no recollection of their asking me for the invoices.

Q. In case of the first several articles that they allotted to you, they appealed to you for your views as to the value several times, didn't they? A. Not to my recollection.

Q. Did you give them any information or any suggestion whatever in respect to the values? A. I don't think I did, sir.

Q. In respect to the selection of the three appraisers, Messrs. Gilliam & Gilliam and the sheriff suggested to you the names of quite a number of gentlemen as appraisers, and you said these three were satisfactory to you; is

not that true? A. The sheriff came around, made no suggestion to me, but said he had selected Mr. Gatlin, Mr. Austin and Mr. Henry McNair. Mr. McNair refused to serve, and I think then they got Mr. Pender. I suggested to the sheriff that they get somebody that was in the grocery business; I don't remember who I suggested now, and Sheriff Knight's reply to me was that they got three good, substantial citizens.

Q. Didn't you tell the sheriff these three gentlemen were satisfactory to you? A. I don't recollect; I won't swear that I didn't tell the sheriff.

Q. Did you make any objections to the selection of any one of these three gentlemen? A. I don't think I did, sir. I might have said something to the sheriff in regard to Mr. Pender, but I don't recollect.

(Objection to foregoing, as to whether he expressed himself satisfied or not.)

Q. You will not state positively that you have interposed any objections at all to any one of these gentlemen? A. I can not state positively whether I interposed any or not? I can not recollect now whether I have interposed any objections to any of these appraisers to anyone.

(Objection.)

Q. Were you present at the sale of the excess of the goods by the sheriff? A. No, sir.

Q. Did you or Mr. Mehegan, directly or indirectly, buy any of the goods at that sheriff's sale? A. I bought none at all, sir.

Q. Did Mr. Mehegan, as far as you know or are informed, buy any of the goods at that sale for himself or for anyone else?

(Objection.)

(Counsel for appellants objects to the form of the questions, in that they ask the witness about a matter that he can have no personal knowledge of.)

A. I know that Mr. Mehegan was away from the store occupied by Mrs. Mallett at the time of the sale. He told me he attended the sale, but whether he bought any goods or not I do not know of my own personal knowledge; of my own personal knowledge I do not know, but as to hearsay, he assisted Mr. Latham in buying some goods, or Mr. Latham bought some goods there at that sale, so I have been informed.

Q. Was the money of Mallett & Mehegan used in the payment of any of the goods bought by C. B. Mehegan or H. T. Latham at the execution sale by the sheriff?

(Objection as irrelevant.)

A. Not that I know of, sir; not a cent. Mallett & Mehegan had no money other than their personal property exemptions that I know of.

Q. What is the personal character of T. H Gatlin, F. H. Pender and C. J. Austin?

(Objection to question.)

A. I do not know anything about their personal character; that is, anything against their personal character.

Q. How is Mr. Gatlin regarded as a merchant; is he a well-informed merchant, careful and conservative?

(Objection.)

A. I do not know.

Q. What is your best opinion?

(Objection.)

A. I have never heard anything against Mr. Gatlin; I have always heard him spoken of as being a good merchant. My opinion is that a man that has been in business as long as he says he has ought to be well informed.

RE-DIRECT EXAMINATION:

Q. You were asked by counsel on the other side last night if you knew anything of the shipment of certain goods to E. T. Roberson at Robersonville to S. W. Bell at

Kelford and a man named Owens at Williamston. I will ask you if at the time of the shipment of these goods or at the time of your examination before the Clerk of the Court in the supplementary proceedings in this action, if you had any knowledge whatever that this shipment was made to fictitious persons or that they were not bona fide sales?

(Objected to as leading.)

A. No, sir; I had no knowledge.

Q. Who was the salesman in job lots for your concern at that time? A. Mr. Mehegan attended to all the jobbing sales and the buying and selling of the most of the jobbing sales.

Q. I will ask you if at the time of the shipment of the goods to T. H. Parker at Rocky Mount you had any knowledge whatever that these goods were shipped to a fictitious person, or that the sale was not a bona fide sale? A. No, sir.

Q. I will ask you if at the time of the examination of yourself before the Clerk in the supplementary proceedings in this action you had any knowledge whatever in regard to the shipment of these goods to T. H. Parker, except what you obtained from a bill of lading handed to you by your partner, C. B. Mehegan?

(Objected to as leading.)

A. Only that bill of lading and that book there. I saw those entries on the book, but I did not know anything about the sales at all.

Q. You have stated that Mr. C. B. Mehegan was the salesman of your concern for the jobbing trade; I will ask you if Mr. Mehegan consulted you in regard to those sales at all? A. He did not.

Q. At the time the appraisers met in the store to set apart to you your exemptions, did anybody advise you not

to show your price list, any bills, or inform them of your cost mark?

(Objected to as leading.)

A. I was advised not to do so.

Q. Who advised you? A. My attorney.

Q. Who was your attorney? A. Mr. J. J. Martin.

(Counsel for appellants states that when counsel for appellees asked to recall Mr. Mehegan to ask a question in this matter they assumed it was a question relative to the issue involved, to-wit, the value of the goods; the questions asked being those that, in their judgment, are irrelevant to the issue involved, they therefore withdraw their consent as to the recalling of the witness and interpose objection both to the questions and answers.)

A. I remember buying for myself one barrel and contents, for which I paid 10 cents. I remember also buying one bottle of ink, for which I paid 15 cents; that is my recollection. The best of my recollection is that these are the only two articles purchased for myself. I bid on other goods, some of which were knocked down to Mr. Ed. Pennington, some to Mr. James Pender and some to Mr. H. T. Latham. I only bought these two articles for myself, or for anyone else.

Q. Didn't you buy in goods for Mr. Latham? A. I bid on them and they were knocked down to Mr. Latham, and I was the highest bidder; they were knocked down to Mr. Latham and he paid for them with his own money. I was acting as agent for Mr. Latham. I don't remember the exact amount, but it was not as much as five or six hundred dollars.

The plaintiffs in error filed the following

ASSIGNMENT OF ERRORS:

1. That the Supreme Court erred in holding that the statute of North Carolina, chap. 471, sec. 6, of the Public

Laws of 1899, whereby, after the defendants were adjudged by the Superior Court of Edgecombe County to be entitled to a new trial as matter of law, the State of North Carolina was allowed to appeal to the Supreme Court, is not *ex post facto* as to the offense charged, and therefore void under Art. I, sec. 10 of the Constitution of the United States.

2. That it appears by the record that the defendants (plaintiffs in error) were tried at September Term, 1898, of the Circuit Criminal Court of Edgecombe County, and convicted. That divers exceptions were taken to the rulings of the Court, and from the judgment the defendants (plaintiffs in error) appealed to the Superior Court of Edgecombe County. At June Term, 1899, of said Superior Court, the Court passed on two of the exceptions and awarded the said plaintiffs in error a new trial. From this judgment the State of North Carolina appealed to the Supreme Court, which reversed the ruling of the Superior Court. That at the time of the alleged commission of the offense charged and of the appeal taken by the plaintiffs in error in September, 1898, and until the passage of the Act of 1899, chap. 471, sec. 6, Public Laws of North Carolina (to-wit, March 6, 1899), there was no statute allowing an appeal for the State from the judgment of the Superior Court in favor of the defendant.

Wherefore, the plaintiffs in error insist that said Act of 1899, chap. 471, is *ex post facto* as to them, in violation of Art. I, sec. 10 of the Constitution of the United States, and void; and that in the opinion and judgment of the Supreme Court, holding to the contrary, there is manifest error.

3. That there are two District Criminal Courts in the State of North Carolina—the Eastern District Criminal Court, which embraces Edgecombe County, wherein plaintiffs in error reside and were tried; and the Western District Criminal Court (chap. 371, Public Laws of 1899),

That in said Western District no appeal is allowed to the State from the order or judgment of the Superior Court granting to a defendant a new trial. (*State* v. *Davidson*, 124 N. C., 839.)

Wherefore, these plaintiffs in error insist that they are denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

4. That the Court holds that the defendants were not made to be a witness against themselves under the following facts, which appear on the record: That an attachment was issued against the property of the defendants, under which the sheriff seized the ledger and the counter book of the defendants. On the trial of this action said books were brought into court, and introduced as evidence against the defendants, over their objection.

The plaintiffs, under rule 21 (*School District* v. *Hall*, 106 U. S., 428), file the following:

ADDITIONAL ASSIGNMENT OF ERRORS.

The plaintiffs in error, in addition to the assignment of errors herein, now assign the following errors in the opinion and decision of the Supreme Court of North Carolina:

5. That the defendants (plaintiffs in error) being partners, were indicted for conspiring with their clerk to cheat and defraud certain creditors; and among the circumstances relied on was the shipment of certain goods to several points, "To order notify," which goods were marked in the names of fictitious persons. The shipment of the goods was shown by a small book of the firm of Mallett & Mehegan, called the counter-book, or day-book. Said book was seized by the sheriff of Edgecombe County in certain attachment proceedings instituted by the prosecutor herein, under an order to attach the goods and prop-

erty of plaintiffs in error. That the said prosecutor testified that he had the information from the small day-book aforesaid, as to the said shipment; and that the said day-book was put in evidence against the objection of the plaintiffs in error. The Supreme Court of North Carolina held that the plaintiffs in error were not thereby made to be witnesses against themselves.

Wherefore, these plaintiffs in error insist that they were thereby made to be witnesses against themselves, and that thus their privileges and immunities as citizens of the United States have been abridged, and they were deprived of their liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

6. That in the said action one of the circumstances relied upon to convict the defendants (plaintiffs in error) was a certain account between the firm of Mrs. John P. Mallett and the said firm of Mallett & Mehegan, and certain erasures and changes had been made thereon; which account, showing the payment to her of a debt of $873, appear on the ledger of said firm. Said book was seized by the sheriff in the attachment proceedings aforesaid, and was produced upon the trial of this indictment and put in evidence against the defendants therein (plaintiffs in error) over their objection. The Supreme Court of North Carolina held that the plaintiffs in error were not thereby compelled to be witnesses against themselves. The plaintiffs in error submit that this ruling is erroneous.

Wherefore, the plaintiffs in error insist that they were thereby made to be witnesses against themselves, and that thus their privileges and immunities as citizens of the United States have been abridged, and they are deprived of their liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

7. The plaintiffs in error submit that by this seizure of said books and their admission into evidence, they have been deprived of the privileges and immunities guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, which extends to all citizens of the United States the privileges and immunities enumerated in the Fourth and Fifth Amendments to the Constitution of the United States.

8. That the plaintiffs in error were examined in supplementary proceedings, instituted by the prosecutor, under The Code of North Carolina, secs. 488 *et seq*., and compelled to answer. By the said statute it is provided that "No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution." The defendants (plaintiffs in error) were fully examined in said supplementary proceedings as to the shipment of said goods, and as to the contents of said books, and among other things as to the account of Mrs. John P. Mallett aforesaid, and upon certain erasures or changes therein. Afterwards questions arose as to the amount of the personal-property exemptions of the plaintiffs in error, and the matter was referred to S. S. Nash, Esq., as referee. At the hearing thereof the plaintiffs in error offered themselves as witnesses, but not as witnesses as to any matter or thing inquired of in said supplementary proceedings; but on cross-examination by the attorneys for the prosecutor herein and against the objection of the plaintiffs in error, they were compelled to go into the same matters as were gone into in their examination in supplementary proceedings, and the evidence thereon was substantially the same. When the present indictment was tried, the defendants (plaintiffs in error) objected to the use of the

evidence elicited in the supplementary proceedings, and as well to the evidence before Nash, Referee. The trial Judge professed to rule out all the evidence in supplementary proceedings, but admitted the evidence before Nash, Referee, which was but a repetition of that already elicited in supplementary proceedings. On appeal to the Superior Court, the Judge held that the evidence in supplementary proceedings had been used against the defendants (plaintiffs in error) and awarded the defendants a new trial. On appeal by the State to the Supreme Court, the Court reversed the ruling of the Superior Court and held that the evidence before Nash, Referee, was competent.

Wherefore, the plaintiffs in error submit that they have been made to be witnesses against themselves, and have thereby been deprived of their liberty without due process of law, and that their privileges and immunities as citizens of the United States have been abridged, contrary to the Fourteenth Amendment to the Constitution of the United States.

9. That the defendants moved to quash the indictment, because the evidence taken in said supplementary proceedings was used before the grand jury in procuring a bill. Both the evidence in supplementary proceedings and the evidence before Nash, Referee, was carried by the witnesses before the grand jury. There was no one present to raise objection against its use. The Judge stated that it was not allowable for the State to introduce any evidence or any statement made by either of the defendants on examination in the supplementary proceedings, nor was it admissible for any witness of the State to testify to any fact, knowledge of which was acquired by them through disclosures made on said examination; but said remark was made before the petit jury. Nevertheless, his Honor overruled the motion, but declined to find any facts as set out in the petition for reargument in the Supreme Court.

The opinion of the Supreme Court states that this was the identical point raised as to the admission of the evidence in the supplementary proceedings at the trial, and that the Judge had all through the trial rejected all evidence that transpired in the supplementary proceedings; but the proceedings before the grand jury were not before the Judge, and the evidence clearly shows that such evidence was admitted.

Wherefore, these plaintiffs in error submit that they have been made to be witnesses against themselves, and have thereby been deprived of their liberty without due process of law, and their privileges and immunities as citizens of the United States have been abridged, contrary to the Fourteenth Amendment to the Constitution of the United States.

It is hereby stipulated that this case may be heard upon the portions of the record already printed, on motion to dismiss or affirm, and as printed, together with the evidence of John P. Mallett and Charles B. Mehegan in supplementary proceedings, and their cross-examination and re-direct examination before Nash, Referee (their direct examination relating only to the valuation of articles in their personal property exemptions); case on appeal by State from Hoke, Judge, exceptions thereto by defendants (plaintiffs in error); dissenting opinion by Douglas, Judge; assignment of errors; additional assignment of errors as contained in brief; and this stipulation.

"These additional portions of the record shall be printed and attached or bound with those already printed.

"This April 12, 1900."

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MAR 12
JAMES H. McK

No. [illegible] 189

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

JOHN P. MALLETT AND C. B. MEHEGAN,
Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA,
Defendant in Error.

PORTIONS OF THE RECORD,

Printed in Compliance with Rule Six of the Supreme Court of the United States.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH

DARK PAGE BLEED THRU

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

JOHN P. MALLETT AND C. B. MEHEGAN,
Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA,
Defendant in Error.

NORTH CAROLINA,
EDGECOMBE COUNTY.

Be it remembered, that at a session of the First Criminal Court for the county of Edgecombe, opening and held in the court-house at Tarboro, N. C., on the fourth Monday in September, 1898, it being the 26th day of September, 1898, present, his Honor Thomas H. Sutton, Judge presiding, and Walter E. Daniel, Solicitor, prosecuting on behalf of the State, the following proceedings were had in the cause therein pending, wherein the State was plaintiff and John P. Mallett and Charles B. Mehegan were defendants, to-wit:

The Minute Docket of said term, page 234, shows the following entry:

CONSPIRACY.

State
vs.
John P. Mallett and C. B. Mehegan.

The defendants came into court and, through their counsel, filed a plea in abatement to the bill of indictment

found at November Term, 1897. The facts are found by the Court to be as stated in said plea. The bill is dismissed by order of the Court.

The State then proceeded upon the bill of indictment found at February Term, 1898, which the defendants moved to quash. Motion overruled, and defendants excepted. The defendants then plead not guilty.

The plea referred to above is as follows:

NORTH CAROLINA—Edgecombe County.
Circuit Criminal Court, 1898.

State
vs.
J. P. Mallett, C. B. Mehegan and H. T. Latham.

The defendants J. P. Mallett and C. B. Mehegan say:

They ought not to be held to answer the bill of indictment against them in this cause, because they were examined in supplementary proceedings, by virtue of subsection 5, sec. 488 of The Code of North Carolina, touching all matters in said indictment alleged against them and made full answers concerning same. That said examination was made prior to the finding of the bill of indictment in this case, and the plaintiff and his attorney in said supplementary proceedings, who were present and in part conducted said examination, are marked as witnesses before the grand jury upon the finding of said bill by the grand jury, and defendants allege that upon their testimony said indictment was found against them.

JOS. J. MARTIN,
G. M. T. FOUNTAIN,
Attorneys for Defendants.

Filed September 27, 1898.

G. W. ROBBINS, Clerk.

CASE SETTLED ON APPEAL.

STATEMENT "A."

STATE OF NORTH CAROLINA—
County of Edgecombe.
Circuit Criminal Court—Special Term, Sept., 1898.

State
vs.
John P. Mallett, C. B. Mehegan and H. T. Latham,
Defendants.

This is a criminal action in which the defendants John P. Mallett and C. B. Mehegan were tried before his Honor Thomas H. Sutton, Judge, and a jury at the special term of the Circuit Criminal Court for the county of Edgecombe, held at the court-house in Tarboro on the fourth Monday in September, 1898. There were two bills of indictment, the one upon which the defendants were tried being as follows:

INDICTMENT.

STATE OF NORTH CAROLINA—
County of Edgecombe.
Circuit Criminal Court—February Term, 1898.

State
vs.
John P. Mallett, C. B. Mehegan and H. T. Latham,
Defendants.

The jurors for the State, upon their oath, present: That prior to the 25th day of July, 1895, there were three several civil actions pending in the Superior Court of Edgecombe, and they were under an order of reference to Thomas H. Battle, Esq., in two of which Julian M. Baker

and Ida M. Adams, as administrators of Margaret L. Woolard, deceased, were plaintiffs, and John P. Mallett and C. B. Mehegan, co-partners trading as Mallett & Mehegan, were defendants, and the other of one said actions, Julian M. Baker and Ida M. Adams, as administrators of said M. L. Woolard, deceased, and as administrators d. b. n., c. t. a., of Solomon Woolard, deceased, were plaintiffs, and the C. B. Mehegan was defendant, and in the midst of the hearing of said causes by the said referee, on the day above mentioned, a compromise was reached between the parties, whereby they agreed at the term next ensuing of said court judgment should be rendered against the said John P. Mallett and C. B. Mehegan for the aggregate amount of five thousand, nine hundred and fifty-two and 73-100 dollars ($5,952.73), with eight per cent interest from February 1, 1894, which judgment was accordingly rendered at the term of said court held on October 14, 1895, and the said defendants, John P. Mallett and C. B. Mehegan, and their clerk, H. T. Latham, late of the county of Edgecombe, on the 1st day of July, 1895, at and in the county aforesaid, with intent to hinder, delay and defraud the said creditors of their just and lawful actions and debts aforesaid, did unlawfully, wickedly, secretly, deceitfully and feloniously conspire together to cheat and defraud the said creditors of the indebtedness due to them as aforesaid, contrary to the form of the statute in such case and provided, and against the peace and dignity of the State.

February 14th, 1898.

W. E. DANIEL, Solicitor

On the back of the said bill are the following entries:

State

vs.

John P. Mallett, C. B. Mehegan and H. T. Latham.

Indictment—Conspiracy.

Witnesses:

X Julian M. Baker.

X Henry A. Gilliam.

James Whitehurst.

X C. L. L. Cobb.

Those marked X sworn by the undersigned foreman and examined before the grand jury. A true bill.

W. T. BRASWELL,
Foreman Grand Jury.

Except as to the term specified in the foregoing bill and the date thereof, the other bill of indictment, dated November 1, 1897, and found at November Term, 1897, of said Criminal Circuit Court, is in the same words and figures and signed in the same way by W. E. Daniel, Solicitor.

On the back of the November bill appear the following entries:

State

vs.

John P. Mallett, C. B. Mehegan and H. T. Latham.

Indictment—Conspiracy.

Witnesses:

Dr. Julian M. Baker. X

Henry A. Gilliam. X

James J. Whitehurst. X

C. L. L. Cobb. X

Those marked X sworn by the undersigned foreman and examined before the grand jury, and this bill found a true bill.

J. M. HOWELL,
Foreman of the Grand Jury.

———

In apt time, before the jury were empanelled, the defendants moved—

1st. To quash the bill of November Term, 1897, on the ground that one of the grand jury who passed on the same had not at that time paid his taxes in full.

Motion allowed.

2d. To quash the bill of February Term, 1898, on the same ground.

The name of D. D. Shelton, one of the grand jurors, is not found in the list of taxes for September, 1897, to September, 1898. Nothing was proved to show that said grand juror had not paid his taxes for the preceding year, that is, the taxes due for September, 1896, to September,

1897. The motion to quash this bill is overruled, and the defendants except.

Again, in apt time, before the jury were empanelled, the defendants moved to quash the bill of February Term, 1898, putting their motion in writing, as follows:

NORTH CAROLINA—Edgecombe County.
Circuit Criminal Court, 1898.

State
vs.
John P. Mallett, C. B. Mehegan and H. T. Latham.

The defendants John P. Mallett and C. B. Mehegan, say:

They ought not to be held to answer the bill of indictment against them in this cause, because they were examined in supplementary proceedings by virtue of subsection 5, section 488 of The Code of North Carolina, touching all matters in said indictment alleged against them, and made full answers concerning same.

That said examination was made prior to the finding of the bill of indictment in this case, and the plaintiff and his attorney in said supplementary proceedings, who were present and in part conducted said examination, are marked as the witnesses before the grand jury upon the finding of said bill before the grand jury, and the defendants allege that upon their testimony said indictment was found against them.

JOS. J. MARTIN,
G. M. T. FOUNTAIN,
Attorneys.

Defendants offered testimony to show that H. A. Gilliam, who was attorney for Dr. Julian M. Baker, and the latter were before the Clerk at the time these defendants

were examined in supplementary proceedings, that these same persons (Gilliam and Baker) went before the grand jury when this bill was found and were examined; that the names of Dr. Baker and Mr. Gilliam both appear as witnesses for the State on the bill of indictment. This testimony was admitted and not disputed by the State.

Mr. Ed. Pennington was sworn as a witness for the defendants, and testified as follows:

I was Superior Court Clerk in July, 1895, and subsequent to that time, and am now The defendants in this case were examined before me in supplementary proceedings. (This witness is offered, so the defendants state, to show that the testimony of the defendants before him in supplementary proceedings was the same as that charged in the bill of indictment.) The witness said that he did not recollect what they testified, except what appeared in his notes.

Counsel for defendants then proposed to ask the witness if the defendants testified to the shipping of certain goods. The State objected, because the proposed evidence was not germane; that shipping goods by defendant is not charged in the bill of indictment. Counsel for the defendants had expressly stated that this witness was tendered only to show that the testimony before him was the same as that charged in the bill of indictment, and that no evidence was set out in the bill of indictment.

The Judge stated then and several times afterwards during the trial, that it was not allowable for the State to introduce in evidence any statement made by either of the defendants on the examination in supplementary proceedings, nor was it admissible for any witness for the State to testify to any fact, knowledge of which was acquired by or through the disclosures made by the defendants on said examination; that such evidence was inadmissible before the grand jury and before the petit jury.

The defendants then introduced the typewritten copy

of the evidence taken before the Clerk in the supplementary proceedings. They offered no further evidence on the said motion to quash, and the same was overruled, and the defendants excepted. The jury was then sworn and empanelled and the trial proceeded.

(a). The State introduced evidence tending to show that Solomon Woolard, a wealthy merchant of Tarboro, N. C., died in 1889, leaving a last will and testament; that his widow, Margaret L. Woolard, qualified as his executrix, and that the defendant C. B. Mehegan who had been the principal buyer and confidential clerk of the testator, continued to manage the property as general agent of the widow and executrix.

(b). That the defendants, John P. Mallett and C. B. Mehegan, were brothers-in-law and engaged in the mercantile business in Tarboro under the firm name of Mallett & Mehegan, from January, 1890, to October or November, 1895, and the other defendant, H. T. Latham, the nephew of Mallett, was their clerk.

(c). That on January 25, 1890, the said Mallett & Mehegan executed their note to the said Margaret L. Woolard, executrix, for $6,636.39, with 8 per cent interest from date, due January 1, 1891, and at the same time a contract was executed by them and her (said note being given for the stock of goods $3,636.39, and borrowed money $3,000.00), that they would rent a certain store belonging to the estate for $400.00 for the year 1890, and that said debt of $6,636.39, and said renting, should be renewed for three years on the first of January each year, provided that the rent after the first year should be raised to $500.00 a year, and provided further, that it should be made to appear, on general exhibit, at the time of renewal, that the business of said firm was in a sound condition.

(d). That said Margaret L. Woolard died, intestate, September 30, 1893, and Julian M. Baker and Ida M. Adams

qualified as her administrators, and also as administrators d. b. n., c. t. a., of said Solomon Woolard.

(e). That shortly thereafter the said Julian M. Baker, one of the administrators, demanded of the said Mallett & Mehegan a statement showing the condition of their business, and they did make out a statement headed "General Statement of Mallett & Mehegan" on or about January 1, 1894, and sworn to by both of them before a justice of the peace, which represented that they were worth $17,000.00 over and above all liabilities; that they had cash on hand, $4,400.00; that they owed only $2,000.00 exclusive of what might be due from them to the Woolard estate; and, in effect, that their business was in a sound, healthy condition. The said Baker and his attorney, H. A. Gilliam, told said Mallett & Mehegan that they wishd this statement examined and verified by an expert accountant, but Mallett & Mehegan would not consent for this to be done. (Said Gilliam and Baker, when testifying in regard to said statement and other matters, were charged by the Court not to testify to any facts of which they acquired information at the examination in the supplementary proceedings or in consequence of such examination; they stated that they would not, and, as a matter of fact, they did not.)

(f). That in the interval between January 1, 1894, and March 1, 1894, said Mehegan had two conversations with Jno. F. Shackelford, in the first of which Mehegan said that his firm could pay in fifteen minutes what they owed the Woolard estate, but in the last conversation he said that Mallett would not agree for him to do it.

(g). The rent and note being unpaid, the administrators instituted suits for the same March 4, 1894, the three civil actions mentioned in the bill of indictment.

(h). That after the institution of said suits, the said Baker had a conference with said Mallett & Mehegan, at

their instance, in the law office of Messrs. Gilliam & Gilliam, with a view to having a settlement; Mallett & Mehegan had a store account against said Margaret L. Woolard, on which they insisted on the right to calculate interest every thirty days, to which Baker assented, and then it was only a matter of arithmetical calculation to fix the exact balance against Mallett & Mehegan. They agreed to settle, but though Baker frequently urged them to settle, they would not do it. It was not till after that conference that Mehegan set up a claim of $800.00 a year for four years for services rendered to the Woolard estate. He subsequently admitted to said Baker that, at said conference, he was not acting in good faith, and that he and Mallett had decided not to pay the debt, and to force the administrators to sue and get what they could.

(i). That C. B. Mehegan lived with his sister, S. Mallett, and her husband, the said John P. Mallett, and a long account in the ledger of Mallett & Mehegan for family supplies, etc., simply headed "home account," had been changed so as to make it appear to be an account against Mrs. John P. Mallett, and this account was credited in July, 1895, with large amounts as follows:

By board of C. B. Mehegan to July 1, 1894, -	$1,237.50
By board of clerk, H. T. Latham, to July 1, 1894,	1,218.75
	$2,456.25
By account of John P. Mallett and family ("and family" erased in the ledger) to July 1, 1895,	$3,300.00
And on September 2, 1895, by board J. P. Mallett for July, August and September, - -	150.00
By board for Mehegan and Mallett for July and August, - - - - - - - -	75.00
And for September, - - - - - - -	37.50
By board for Mallett for September, - -	50.00
	6,068.75

The ledger shows cash paid by Mallett & Mehegan to Mrs. John P. Mallett on July 19, 1895, $873.04; that the heading of this account in the ledger had on many of the pages been altered.

(j). That on May 18, 1895, the said S. Mallett had in her possession a large roll of money; that on that day she bought ten shares of stock in the Bank of Tarboro, paying on the same $400.00, 40 per cent of the value, and using for that purpose only about one-third of said roll of money.

(k). That the three civil actions were referred to Thos. H. Battle, Esq., and were being heard by said referee in Tarboro, on July 25, 1895; that the said Mehegan was a voluntary witness for the defendants in said suit; that he was examined in regard to said statement of January 1, 1894, and said that it had been carefully prepared and was in all respects correct; that they had counted the cash, $4,400.00; that his firm's business was in a healthy condition, and that they were abundantly able to pay what they owed the Woolard estate, even if they were not allowed the counter-claim set up in said action, the $800.00 a year for four years for services, etc.

(l). That in the midst of the hearing before said referee, on July 25, 1895, a compromise was reached between the parties, reduced to writing as follows:

"It is consented and agreed by all the parties hereto that the three above-entitled cases (those mentioned in the bill of indictment) be consolidated into one case, and that the rights and liabilities of the parties, as determined in the one case, shall determine their rights and liabilities in all of them. It is further consented and agreed that the pleas of the defendants be withdrawn and that all the testimony introduced be stricken out. It is further consented and agreed that the referee report to the Court that the defendants are indebted to the plaintiffs in the sum of five thousand nine hundred and fifty-two dollars and seventy-

three cents ($5,952.73), with 8 per cent interest from the first day of February, 1894." The amount claimed by the administrators was about $11,000.00, but they accepted the compromise on the defendants' assurance that they would pay the amount agreed on without further trouble.

(m). That it was subsequently ascertained from the day-book of Mallett & Mehegan that they made the following shipment of goods on so-called verbal orders to fictitious persons, at the dates given below:

E. T. Roberson, Robersonville, Oct. 4, 1895,	$189.09
T. H. Parker, Rocky Mount, Oct. 5, 1895,	148.77
S. W. Bell, Kelford, Oct. 7, 1895,	168.51
M. H. Owens, Williamston, Oct. 9, 1895,	129.56
	635.93

That these goods were shipped to the above-named parties, who had no real existence (as was first learned by the prosecutor, Julian M. Baker, in January, 1896), marked "O. N.," that is, "Order, notify," the parties to be notified, the bills of lading being kept by Mallett & Mehegan; that the goods were to be delivered by the railroad company on receiving bill of lading; that the goods were packed, marked and shipped by C. B. Mehegan; that in the examination before S. S. Nash, Esq., Referee, in September, 1897, John P. Mallett said he did not have any "accurate knowledge" of these shipments, explaining that by "accurate knowledge" he meant "assisting in packing, marking and shipping the goods; that said Mallett kept the firm ledger, to which the other entries in the day-book were transferred, but not those above specified; that soon after the arrival of the goods in Rocky Mount, Latham called for them but was told by the railroad agent there that he could not get them without surrendered bill of lading. That soon after John P. Mallett went to Rocky

Mount and asked the railroad agent there how to get the goods shipped to T. H. Parker; that said goods were afterwards, to-wit, on October 18, 1895, shipped by the railroad company from Rocky Mount, in the name of H. T. Latham as consignor, to Blount Bros., Bethel; that in the examination before Mr. Nash, John P. Mallett said he did not have any knowledge of said shipments to fictitious persons, but only observation; that he stayed there in the store of Mallett & Mehegan and took an active part in conducting the business; that C. B. Mehegan went to Robersonville and Williamston and sent H. T. Latham to Kelford for the goods shipped to those respective places; that in the examination before Mr. Nash, Mehegan said that he told Mallett to go to Rocky Mount, and he presumed he did; that they sold the goods at the points to which they were shipped and pocketed the money and spent it, paying none of it to the prosecutors on their said indebtedness; that H. T. Latham went to Kelford on October 16, 1895, and registered at the hotel there first as H. T. Thomas (afterwards changing the Thomas to Latham on seeing near him a certain man who had introduced him, Latham, to the hotel keeper at the depot); that Latham offered for sale in Kelford the goods shipped to S. W. Bell.

(n). That at the term of the Superior Court of Edgecombe County held October 14, 1895, the next Court after July 25, 1895, judgment was rendered in accordance with the compromise of the date hereinbefore mentioned, and on said judgment at least $4,500.00 is still due.

(o). That at the time said compromise agreement was entered into, and as an inducement moving the plaintiffs in said action to accept the same, the said Mallett & Mehegan represented to the said plaintiffs their entire ability to meet and fully perform the same, and repeatedly gave assurance of their sincerity, good faith and purpose to carry out the same in all respects according to the terms

thereof. That the said plaintiffs thereafter fully relied upon the compromise agreement and the assurances of the said Mallett & Mehegan as to their financial ability and honest purpose to fully meet and comply with the terms thereof, and so continued to repose confidence in the same until late in the afternoon of Thursday preceding the convening of the Superior Court on Monday, October 14, 1895, when they received from them the following communication, to-wit:

Tarboro, N. C., Oct. 10, 1895.

Dr. J. M. Baker,
Miss Ida M. Adams,
Administrators of M. L. Woolard.

Dear Sir and Miss:—In settlement of your claim against us we respectfully submit the following proposition, viz:

1st. The report of the referee shall be four thousand ($4,000.00) instead of five thousand nine hundred and fifty-two and 73-100 dollars ($5,952.73). To pay the amount (four thousand dollars) we will deliver into the hands of the Clerk of the Court, or cause to be delivered into his hands, on the day the report of the referee is affirmed and docketed, the following bonds and mortgages which we will assign to you, viz:

Note against O. Burnet and accrued interest to October 15, 1895, - - - - - - - -	$39.49
Note against M. H. Pippen and accrued interest to October 15, 1895, - - - - - -	283.79
Mortgage against B. F. Havens and accrued interest to October 15, 1895, - - - - -	50.00
Five notes against J. A. Warren, secured by deed of trust, - - - - - - - - - -	696.83
We deduct $10.00 of accrued interest on above to equalize 6 per cent with 8 per cent interest.	
Amount forward - - - - - - - - - - - - - - - -	1,070.11

Amount forward	1,070.11
Mortgage against W. T. Gray and others, with accrued interest to October 15, 1895,	260.00
	1,330.11
Deed in trust for your benefit by J. P. Mallett and wife on J. P. Mallett's property, worth	800.00
Cash,	2,412.39
	4,542.50

The debts and cash offered will amount to four thousand five hundred and forty-two and 50-100 dollars, which, when delivered to the Clerk of the Court, shall be in full satisfaction of your claim, principal, interest and court costs.

2d. The release and discharge of C. B. Mehegan as agent and attorney for M. L. Woolard, executrix, and M. L. Woolard individually, as agreed, to be executed and delivered to C. B. Mehegan when settlement, as hereinbefore named, is made with the Clerk of the Court.

3d. The report of the referee is to be recorded in full when $4,000.00 is substituted for $5,952.73.

We desire that the release and discharge to be executed by you to C. B. Mehegan shall set forth the period of time which he occupied such position, the amount of receipts and disbursements as a whole which he made (as per statement of Mr. Gaskill) and the books and papers were examined by an expert accountant and found to be correct.

As we have the assurance that we can borrow the money if accepted, we make it in good faith and request that you let us hear from you at your earliest convenience, and oblige,

Yours very truly,

MALLETT & MEHEGAN.

(p). That immediately upon the receipt of the communication set forth in the preceding paragraph hereof, the said Baker and Adams, Administrators, made affidavit in said action, among other things alleging as follows:

"That since the 25th day of July, 1895, and more particularly of late, the defendants have permitted their stock to run down and to become greatly depleted, that they have sold and are selling their stock of standard groceries below the market price, that they are rapidly selling and disposing of their stock at a sacrifice and converting the same into cash with the view and purpose of secreting and withdrawing the same from the reach of the plaintiffs (Baker and Adams); that affiant is informed and believes that the defendants (Mallett and Mehegan) have in possession a large sum of money from the sales of their said stock, notwithstanding their pretense and representation contained in their communication of this date that they would be obliged to borrow the amount named therein; that the defendants (Mallett and Mehegan) have heretofore carried a large stock and bought of northern merchants in large quantities, but of late have only bought in small quantities from local jobbers. The affiant is informed and believes that the defendants are largely indebted, if not insolvent, and that, for the reason and circumstances above related, the defendants have withdrawn and secreted large sums of money for the purpose of defrauding the plaintiffs of the said indebtedness, and that it is their purpose and intent to assign, dispose of and secrete their property with intent to defraud the plaintiffs and their creditors and to hinder, delay and defraud them in the enforcement and collection of their debts."

That upon the aforesaid affidavit the Clerk of the Superior Court of Edgecombe County, on the 10th day of October, 1895, issued a warrant of attachment to the sheriff of said county, commanding him to levy the same upon and

seize all the property of the said Mallett & Mehegan to be found in his county; that no answer having been filed in said proceedings by the said Mallett & Mehegan, and no motion made to dismiss said warrant of attachment, judgment was accordingly rendered at Fall Term, 1895, of said court, continuing said attachment and condemning the property levied upon and seized by the sheriff thereunder for the payment of the said indebtedness to Baker and Adams, Administrators.

(q). That in January, 1898, the defendant Mehegan had a large amount of money in his possession, a big roll of what he said were $20.00 bills in one pocket; he said he had twice as much in another pocket, and three times as much coming to him by express that day.

3. The State's witnesses, H. A. Gilliam and Julian M. Baker, testified as set forth in articles (e) and (k), ante, in regard to the statement of January 1, 1894, by the defendants as to the financial condition of the firm, the said witnesses testifying to statements made by C. B. Mehegan in the examination before Thos. H. Battle, Esq., Referee, on July 25, 1895. The defendants duly objected, because the said statement of January 1, 1894, had been used as the basis of the examination of said Mehegan subsequently, to-wit, in January, 1896, in the supplementary proceedings before the Clerk. The witnesses of the State were cautioned by his Honor, and did not testify to any statement made by said defendant in the supplementary proceedings, nor to any fact of which they had acquired knowledge by reason of said examination. The objection was overruled and the defendants excepted.

4. Julian M. Baker testified that he had made diligent search for said statement of January 1, 1894, among his papers in his office, among the papers in his attorney's office; that he had searched for it among the papers of the estate; that he had not been able to find it; that the last

time he saw it was at the hearing before the referee, Mr. Thos H. Battle, when the said Mehegan was a voluntary witness in behalf of the defendants. The State was allowed to prove the contents of the statement. The defendants object, because they were examined before the Clerk in the supplementary proceedings. Objection overruled, and the defendants excepted.

5. Dr. Julian M. Baker testified that he assented to the calculation of interest every thirty days on the store account of Mallett & Mehegan against the intestate, M. L. Woolard, as stated in article (h), ante. The defendants objected to that testimony. Objection overruled. Defendants excepted.

6. After testifying to the conference in Gilliam & Gilliam's office, as stated in article (h), the witness, Dr. Baker, testified that the defendant Mallett refused to talk to him about the claim. The defendants object to all this testimony. Objection overruled. Exception by the defendants.

7. The personal property exemptions of each of the defendants now on trial were allotted to them under the warrant of attachment mentioned in article (p), ante. They filed exceptions to nearly every one of the articles assigned, insisting that there was an over-valuation in nearly every case. The two appeals were referred from the Superior Court to S. S. Nash, Esq., who heard the same in September, 1897. At that hearing both of the defendants were voluntary witnesses in their own behalf, as they were in the trial in July, 1895, before the referee, Mr. Thos. H. Battle, and on neither of these occasions did either of the defendants seek to avail himself of his privilege not to answer any question, as the answer might tend to incriminate him.

In regard to the day-book or counter-book, mentioned in article (m), ante, (which book was found by the sheriff

in the defendants' own safe when he levied the attachment), the witness, Dr. Julian M. Baker, stated that the first time he heard this book referred to was at the examination in supplementary proceedings. The witness was then asked by the State whether or not he had heard said book referred to by Mallett & Mehegan at the examination before Mr. Nash, when the defendants offered themselves as witnesses in their own behalf voluntarily. The defendants object, because the testimony now offered is subsequent to the examination in the supplementary proceedings. Objection overruled, and the defendants except.

8. The witness, Dr. Baker, then proceeded:

"This book (the said book) is the day-book of Mallett & Mehegan. At the examination before Mr. Nash, Mallett said it was a counter-book; that the entries in it were transferred to the ledger. The entries are in Mehegan's handwriting, viz: 'E. T. Roberson, Robersonville, verbal order, October 4, 1895,' etc." See article (m), ante. The defendants ask that an exception be again put down, and the Court remarked that this objection was already stated more than once, and was ample to protect defendants, and that it was not necessary to enter another objection. To this the defendants except.

9. After reading out the verbal orders specified in article (m), ante, and stating that the entries in said book are in the handwriting of Mehegan, the witness stated: "I know of my own personal knowledge that there is no such person as S. W. Bell at Kelford, N. C." The defendants object, and allege that the statements made by them before Nash, Referee, were not voluntary, because, while they did offer themselves as witnesses in their own behalf, yet, upon cross-examination, when these matters were gone into, and this information elicited, they were not voluntary witnesses. (It does not appear that either of them ever

claimed the constitutional privilege to remain silent.) Objection overruled. Defendants except.

10. The same witness was shown the ledger of Mallett & Mehegan. One of the defendants was examined about this book in the supplementary proceedings. On that, the defendants object to the contents of the book being now proven. The State claims and says that the information now asked for was obtained by the witness before the supplementary proceedings were instituted, and that they propose to ask as to that only, and not as to any information obtained in the supplementary proceedings. The objection overruled. Defendants except. The witness then testified as indicated in article (i), ante.

11. On cross-examination this witness, Dr. Baker, was asked these questions by the defendants:

Q. Did you go before the grand jury when this bill was found, and did Mr. H. A. Gilliam go with you? A. We both went before the grand jury at different times.

Q. Did you carry with you before the grand jury, when you testified there on this bill of indictment, the evidence taken in the supplementary proceedings?

Counsel for the State objects to this question, and insists that the defendants' charge that the bill of indictment was found on illegal evidence had already been disposed of by the Court. [See exception (2), ante, that a motion to quash or a plea in abatement on such ground must be made on the arraignment before pleading, and after that would only be allowed at the discretion of the Court.]

The State further showed that all the testimony offered at the trial, based upon information or evidence, oral or writings, obtained upon the examination in the supplementary proceedings, had been excluded by the Court. Objection sustained. Defendants except.

12. C. L. L. Cobb, a witness for the State, testified as follows:

"I have been living at Kelford, N. C., six years last December. I am in the hotel and livery business. I was living in Kelford in October, 1895. I was at the depot October 16, 1895, on arrival of a certain train. Two men alighted from the train. One was a Mr. Hayden, whom I knew; he introduced the other to me as 'H. T. Latham.' I met them at the depot, morning train. There were goods there in the depot marked to 'S. W. Bell.' "

The defendants object to that part of the witness' testimony relating to having met a man introduced to him as H. T. Latham. Objection overruled. Defendants except.

13. The witness Cobb then exhibited a book, his hotel register. "The person who was introduced to me as H. T. Latham came to the hotel and first registered as H T. Thomas. He turned off from the book. Hayden was near by, coming up to the register. Then Latham wrote the word 'Latham' over the word 'Thomas.' Both words written there October 16, 1895. (The book is shown to the jury.) Latham offered the goods sent to S. W. Bell for sale. He offered to sell me these goods, and said he was going to try to sell them."

The defendants objected to this evidence because the matter was examined into in the supplementary proceedings, after the witness saw Latham at Kelford, and also because H. T. Latham is not on trial. The State insisted that apart from these grounds there were prima facie grounds for believing in the existence of the conspiracy, and that therefore the acts and declarations of Latham in execution or futherance of the scheme to defraud were admissible in evidence against the two defendants who were on trial. Furthermore, Mehegan, in his testimony before Nash, Referee, stated that he had sent Latham to Kelford. Objection overruled. Exception by defendants.

14. The testimony of the witness, E. Miller, was as follows:

"I know the defendants. Mehegan, in 1897, showed me five $5.00 gold pieces, and after that he showed me many kinds of money."

The defendants object. Objection overruled. The defendants except.

The witness proceeded: "And in January, 1898, he said he had a whole lot of money 'now in my pocket,' and took it out and showed me a large roll, and asked me how much I thought it was. I said it (the roll) might be $1.00 bills. He said 'no, they were $20.00 bills.' He said he had twice as much in another pocket, and three times as much 'coming by express to-day.' He said, 'Some people say I have no money, but that is my business. No one else knows, and it is no [one] else's business.' After this, when I had been summoned as a witness, he asked me what I was going to say. I told him I should only tell what I knew. He said people talk too much. He called me in a room and said this."

CROSS-EXAMINATION:

"I came from Russia. I have been here three years, going on four. I went into business here. I borrowed money through Mehegan. Mehegan said the gold money belonged to his aunt. My wife is in business on her own account. This money (the big roll) was shown to me about the time his brother, J. G. Mehegan, started the Citizens' Bank here. He said a lot of people said he had money, but it wasn't true. He told me if I was summoned as a witness to tell all I knew. This money was shown to me just before his brother started the bank."

15. At this stage of the trial four witnesses were tendered by the defendants to show what was testified to before the grand jury. The State objected to their being examined, on the grounds set forth in paragraph (11), ante. Objection sustained. Defendants excepted.

16. The testimony of the witness, John L. Shackelford, was as follows: "I know the defendants, Mallett & Mehegan, and recollect the time the suits were brought against them. Before the suits were brought, Mehegan asked me for advice. He said that Dr. Baker had qualified as administrator, and that he was afraid he was going to push them." (The suits were instituted, it is admitted, on March 4, 1894.)

The defendants object to what the witness had testified. Objection overruled. The defendants except.

Witness proceeded: "I told Mehegan to settle the matter up if it took all he had. I asked him the amount of the indebtedness, and he told me, but I do not now recollect it. He said that he could settle it in fifteen minutes; that he had money in his safe. Mallett & Mehegan conducted the business from that time till the time of the attachment. Since then they have not done any business. Some time after this I met Mehegan. The suits had been begun. I asked him why he did not settle. He said that Mallett would not agree to it."

17. "On May 17, 1895," continued this same witness, "I saw Mrs. John P. Mallett. She had money that date, and paid me $400.00 for ten shares of stock in the Bank of Tarboro; that is, she paid me 40 per cent on the par value of said stock. She had a large roll of money besides the amount she paid me."

Objected to by the defendants. Objection overruled and exception. [In the attachment affidavit mentioned in article (p), ante, served on Mallett & Mehegan, and not answered by them, it was alleged that on May 8, 1895, the said John P. Mallett, then greatly embarrassed financially, and not retaining property sufficient for the payment of his indebtedness, turned over to his wife, S. Mallett, $400.00, which she invested in the purchase of ten shares of stock in the Bank of Tarboro.] There was some further

testimony by the witness Shackleford but it was not objected to by the defendants.

18. The witness, H. A. Gilliam, was warned or cautioned by the Court not to testify to any statement by the defendants, or either of them, made on the examination in the supplementary proceedings. He testified as follows: "I am one of the attorneys representing the administrators of the Woolard estate. In accordance with the contract between them and Mrs. Woolard [see article (c), ante], Dr. Baker and I demanded of Mallett & Mehegan a statement of the affairs of the firm. We told them that we would not accept a statement made by them alone; it must be made out by an expert accountant and verified. Subsequently a statement was filed by them in the Clerk's office, dated January 1, 1894, sworn to by them before a justice of the peace. This is the same paper testified to by Dr. Baker as having been lost. Both Dr. Baker and I have looked for it in my office and in the Clerk's office It can not be found. This paper was before Mr. Thos. H. Battle, Referee, on July 25, 1895, and was being inquired into. Mehegan was examined in respect to it. He was examined as to the condition of the affairs of Mallett & Mehegan, at the time of making the statement and at the time of the examination."

Defendants object. Objection overruled. Exception.

"Mehegan said that the statement made out and filed was true; that it had been carefully verified by him, Mallett, and Latham, their clerk; that the money mentioned in the statement had been counted. He said this on the examination before Mr. Battle, Referee. This paper (shown to witness) represents the substance of said Mehegan's evidence before said referee. Mehegan was examined as to each item of the statement and said it was taken with care. He was asked as to the condition of Mallett & Mehegan at that time, July 25, 1895. He said that they could

pay the Woolard estate all that they owed it. The amount due from them to that estate was about eleven thousand dollars. After that attachment had been levied [as stated in article (p), ante], we asked for the combination of the safe and the cost mark of the goods, but they refused to give us either. Upon the advice of their counsel they refused."

Defendants object. Objection overruled. Exception.

19. The witness: "After the warrant of attachment was issued and the defendants' store closed, Mallet & Mehegan began to collect money due them. I know they collected some. There was about two hundred or two hundred and fifty dollars in money (some) of it marked as due to other persons, found in the safe." (An exhibit of what was found in the safe is produced.)

The defendants then called for the written evidence taken before S. S. Nash, Referee. The evidence was accordingly produced, and the defendants object. The evidence originally taken before the [referee] Nash was admitted, and the defendants except.

"Mehegan, on that examination, said that he had made collections after the attachments were levied and put the money in his pocket. Both Mallett & Mehegan, voluntary witnesses in their own behalf before Nash, Referee, were on cross-examination asked about the shipments to Roberson, Parker, Bell and Owens, and said that they were fictitious persons, and that they, Mallett & Mehegan, had reclaimed the goods, and sold them and put the money in their pockets He said that these shipments were made in October, 1895. Mallett said that he had no knowledge of the sales; said he had no 'accurate knowledge.' He said that he meant that he did not pack or mark the goods; that he saw Mehegan shipping them and made no remark; that he (some time between the date of the levy, October 11, 1895, and the date of the examination in the

supplementary proceedings), went to Rocky Mount and reclaimed the goods shipped to T. H. Parker."

The State offered to show that this witness was present at the sheriff's sale under the attachment, and that defendants bought goods there.

Defendants object. Objection overruled. Defendants except.

"The sale was in November, 1895; Mehegan bought some of the goods; said the goods were bought for H. T. Latham; they were put in the store occupied by S. Mallett, wife of the defendant John P. Mallett. Mallett & Mehegan continued to occupy the same store where the goods were attached, and where a business was (thereafter) carried on in the name of S. Mallett "

Cross-examination.—"As one of the attorneys of the said administrators, I was present and representing them both on the examination in the supplementary proceedings in December, 1895, and January, 1896, and before the referee, Mr. S. S. Nash, in September, 1897. In the latter examination, Mallett was asked if he hadn't stated so and so in the examination before the Clerk in the supplementary proceedings." (Herein the counsel for the defendants used the written evidence taken before Nash, Referee, and from that evidence asked the witness what the defendants had said about collecting debts after the attachment had been levied.)

The witness proceeded: "Mehegan said he did collect debts due the firm and put the money in his pocket and had a right to do so. He said he did not consult with Mallett as to the shipment of the goods (to the fictitious persons). Mallett says he saw them packed. The debts were not garnisheed when they were collected by Mehegan, but the attachment was out and levied upon all their goods, accounts, etc.; Mehegan said he used part of the money to pay old debts of Mallett & Mehegan; that he

collected money before and after the allotment of the personal property exemptions."

20. Defendants' counsel asked the witness, H. A. Gilliam, if the affidavit of O. Williams, Jr. (who was agent of the sheriff and made the sale under the attachment proceedings), did not show that Latham bought the goods that were carried to Mrs. S. Mallett's store as previously stated.

The State objected to this as hearsay evidence. Objection sustained. Defendants excepted.

(They afterwards said that they did not offer the O. Williams, Jr., paper as evidence.)

21. The State offered the written or documentary evidence taken before Thos. H. Battle, Referee, prior to the examination in supplementary proceedings. The defendants objected for that (1) the document offered was not the original, and (2) it was not a full copy of the evidence. It appeared that this was one of the carbon copies made by the stenographer from his notes at the same time that he made the original, and that the report of the evidence so copied was complete so far as it related to the matter now in controversy; that it was not completed because a compromise between the parties was reached and further litigation then suspended. The Court admitted the paper for the purpose of refreshing the witness' recollection and not as independent or substantive testimony. The defendants excepted. In this examination before Battle, Referee, Mallett & Mehegan testified voluntarily as witnesses in their own behalf.

The witness, H. A. Gilliam, proceeded: "In this examination before Battle, Referee, Mehegan stated that they, Mallett & Mehegan, were able to pay what they owed the Woolard estate, even if they were not allowed the counterclaims set up by them."

22. The first bill of indictment hereinbefore mentioned,

the one found at November Term, 1897, was introduced in evidence by the State.

The defendants objected. Objection overruled. Exception.

23. The State closed. The defendants being called on to introduce evidence if they desired to do so, their counsel stated that they desired to see the note mentioned in article (c), ante, which they had notified counsel for the State to produce. The note had been filed with the Clerk when the judgment was rendered as stated in article (c), ante. Several efforts were made to find the note, in vain, and it not being filed, the Court desired the defendants to proceed to introduce witnesses or to argue the case. The defendants' counsel declined to introduce testimony because the note was not present, and the Court directed counsel to proceed. Defendants except.

A copy of the note, admitted to be a copy, was here tendered to the defendants' counsel, and they had it in their possession before the argument began, and they still refused to introduce testimony.

The defendants had the opening and conclusion of the argument before the jury.

24. After three of the counsel had spoken to the jury, the defendants filed the following paper:

NORTH CAROLINA—Edgecombe County.

Circuit Criminal Court, Special Term, Sept. 26, 1898.

State
against
J. P. Mallett and C. B. Mehegan.

The defendants put the evidence taken in supplementary proceedings in evidence before his Honor, Judge presiding, upon their preliminary plea, in which they state "That every fact alleged in the indictment in this case, the de-

fendants were each fully examined about in said supplementary proceedings," and especially called the Court's attention to page 3 of the evidence taken in supplementary proceedings, in which the object of said examination is stated by plaintiffs' counsel to be "To show the defendants went to work in a systematic way for purpose to cheat J. M. Baker and Ida M. Adams, administrators of M. L Woolard, etc , and to fraudulently dispose of their property to prevent the recovery of their judgment, and pages 3, 7, 8, 10, 11, 12, 13, 14, 88 and others, which defendants say will fully disclose to the Court that the same evidence was elicited from the defendants in said supplementary proceedings as has been placed before the jury in this trial, and ask the Court to find the fact as to the truth of the facts alleged in said preliminary plea.

The defendants further offer the Court the record of the court to show the evidence taken before S. S. Nash, Referee, and which has been offered in evidence by the State in this case, and ask the Court to find the fact whether or not this evidence is not in substance the same evidence elicited from the defendants in the supplementary proceedings; and the defendants were not asked by plaintiffs to elicit the evidence before Nash, if they did not testify to these facts in supplemental proceedings, and they were not compelled to answer by the Court upon their objection, and if this question were not pertinent to the issue before said court, and if the Court should so find they ask that said evidence be excluded.

J. J. MARTIN,
G. M. T. FOUNTAIN,
Attorneys.

The State here contended:

1. That the defendants' plea that the bill of indictment was found upon illegal evidence was raised by them before

the jury were empannelled and that said plea had been passed on by the Court adversely to the defendants. [See exception (2), ante.]

2. That, after the empanelling of the jury and the beginning of the trial before them, certainly at this stage of the trial, such a plea in abatement or motion to quash will only be allowed at the discretion of the Court, and ought not now to be considered.

3. That as for the documentary report of the evidence before Referee Nash, it was produced because called for by the defendants themselves. [See exception (19) ante.]

4. That neither on the examination before Referee Nash, nor on that before Referee Battle, had either of the defendants urged their privilege to refuse to answer any question on the ground that the answer thereto might incriminate.

5. That all during the trial his Honor had carefully excluded evidence of any and every statement made by defendants, or either of them, in the supplementary proceedings, and also evidence of facts that became known by means of or in consequence of the examination in said proceedings.

The Court ruled on defendants' motion as follows:

The Court declines to find "the facts" as asked for, because:

(a) There has been no evidence that the charge in the bill of indictment and the testimony of the defendants in the supplementary proceedings are the same; the bill does not set out the "evidence" or facts, the finding of which is asked for by the defendants.

(b) For that all testimony offered or intended to be offered by the State, based on information obtained by the defendants' examination in supplementary proceedings, was excluded by the Court, and none was admitted.

(c) This prayer or request was made in writing (on this

sheet) after three of the counsel in the case had spoken to the jury, and is therefore too late and not in apt time, according to the rules of the Supreme and Superior Courts, and the trial was in progress and would have been necessarily suspended while the Court undertook to do what the defendants' counsel herein request.

SUTTON, J.

25. The defendants asked the Court to charge the jury as follows:

1. Before the defendants can be convicted on this bill of indictment, the State must show to the jury, beyond a reasonable doubt, that these defendants combined and confederated together to do some unlawful act, or a lawful act in an unlawful way.

This was given.

2. That unlawful here means indictable.

This was given

3. That, if the jury should believe that the defendants did combine and confederate together to ship some of their goods off to fictitious persons, to sell and apply the proceeds to their own use, this would not be unlawful, although it should be done secretly and should prevent the plaintiffs Baker and Adams from collecting a debt against them, for they had a right to sell their goods at any time before they were attached, either openly or secretly, and they would not be guilty.

This was declined, and the defendants excepted.

4. That if the jury should believe that C. B. Mehegan shipped these goods without any concert of action or agreement between him and the other defendants, they would not be guilty, for it is the conspiracy to do an unlawful act and not the doing of the act for which they are indicted.

This was given with the following modification:

Provided, the defendant Mallett had no knowledge or information of the doing of any of these acts and there was no understanding, agreement or combination to do these acts with intent to cheat and defraud.

Defendants except.

5. That, if the jury should believe that the defendants owed Mrs. Mallett money for board, although said board was for the board of her husband and his family, and although said board was not due in law, yet they would not be guilty of an indictable offense, and you can not convict them upon this bill of indictment.

This was given with the following modification:

Provided, the act of her husband paying his wife his board was not done for the purpose of secreting his money or putting it beyond the creditors' reach, and so done with intent to cheat and defraud.

Defendants except.

6. That upon all the evidence you are instructed to find the defendants not guilty.

Declined. Defendants except.

J. J. MARTIN,
G. M. T. FOUNTAIN,
Attorneys.

26. The defendants also filed the following with the judge:

We insist that conspiracy in North Carolina is a misdemeanor, and as such is barred by the statute of limitations. (State v. Jackson, 82 N. C., 565.)

We therefore ask the Court to charge the jury the defendants are not guilty as charged in the bill of indictment.

This was declined, and the defendants excepted.

27. The defendants requested the judge to put his charge in writing, and he did so, as follows:

"A conspiracy is where two or more persons combine or conspire to do a wrongful act, or to injure any individual, or to do acts which are unlawful or prejudicial to the community; is an unlawful combination, a conspiracy and indictable. When two or more persons combine, agree and conspire to cheat and defraud any one, here, it is charged, Dr. Baker and Miss Adams, representing Mrs. Woolard's estate, then it is an unlawful combination and agreement and an indictable conspiracy, if you believe the testimony, and it so satisfies your mind beyond a reasonable doubt. The acts and declarations of the defendants are evidence for the jury to consider in determining whether or not the defendants did form the conspiracy for which they are indicted. The jury are charged that the acts and declarations of any one of the defendants, although evidence against the party making the same, are not evidence against the others, unless you find that there was a common purpose, agreement or understanding existing between them, and, in that case, the acts and declarations of each one of the parties who had the common purpose are competent evidence for the jury to consider against each one of said defendants who had such a common purpose to unlawfully cheat and defraud Dr. Julian M. Baker and Miss Ida M. Adams, representing the estate of Woolard. It is not material in an indictment for a conspiracy that the unlawful purpose should be accomplished, as the conspiracy or the illegal combination is the offense, if you are satisfied from the evidence beyond a reasonable doubt that such unlawful purpose or agreement existed. The defendants are entitled to all reasonable doubt; and if you have such reasonable doubts, it is your duty to acquit. But if upon the whole testimony, the facts, circumstances and surroundings of this case, you are satisfied beyond a reasonable doubt that this unlawful agreement, conspiracy and common design existed to cheat and defraud Baker

and Adams, then it is your duty to find them guilty. As to whether this is a felony or misdemeanor, it is not the province of the jury to inquire; that is a question of law, reserved for the Court to decide. As to the statute of limitations, I charge you that this indictment is within the legal times, and is not barred by lapse of time."

State contends:

1. Partners and nephew.
2. Falsified ledger.
3. Home account—change of words—Mrs. J. P. Mallett.
4. Credit to Mrs. Mallett, $6,000.
5. Shipping goods to fictitious persons.
6. Participation in that of Mehegan & M.
7. Send Latham to sell them.
8. Making way with their goods secretly.
9. Using proceeds for individual purposes.
10. Latham's false registration and his sale of goods for M. & M. sent to an unknown person.
11. The confidential relations between Sol. Woolard, and his widow after his death, and Mehegan.
12. Their sworn statement filed before Clerk Pennington as to their solvency, showing $17,500.00 net, except their debt to Woolard estate.
13. Their agreement as to the amount to be rendered as a compromise judgment.
14. Their refusal to comply with this compromise judgment.
15. Their evasion of Dr. Baker, who was seeking a settlement, and the counterclaim of $3,200, set up for the first time before Battle, Referee.
16. Mrs. Mallett, wife of one of the defendants, having possession of a large amount of money, buying bank stock in her name, after the attachment against the defendants had been instituted.
17. Mrs. Mallett shortly thereafter going into mercantile

business in her own name, and the three, Mehegan, Mallett and Latham, being in and about the store, seemingly in control.

18. That all items on the blotter are transferred to ledger, except the sales of goods to Kelford, Rocky Mount, etc.

19. Latham sent by M. & M to sell goods and his false registration.

Defendants' contentions are:

1. That the defendants did not combine and conspire together to cheat and defraud or do any other unlawful act.

2. That Mallett had no knowledge or connection with Mehegan in forming the acts charged.

3. That the defendants had a right to sell the goods to fictitious persons.

4. That Dr. Baker was not deceived.

The jury returned a verdict of guilty as to both defendants, C. B. Mehegan and J. P. Mallett.

Rule for new trial for

(1) Errors in charge of Court.

(2) Refusal to admit testimony.

(3) Exclusion of competent testimony.

(4) That the verdict of the jury was contrary to the weight of the evidence.

Rule discharged.

The Court held that this indictment was a misdemeanor. Judgment was then rendered by the Court as follows:

"It is ordered and adjudged that the defendants, C. B. Mehegan and J. P. Mallett, be each confined in the county jail for two years; at the expiration of said term to be discharged upon the payment of the costs according to law."

Notice of appeal given. Forty days allowed defendants to make out case on appeal, and forty days thereafter for the State to make out counter case on appeal or file exceptions to the defendants' case. Appeal bond in $25.00 ad-

judged sufficient. Appearance bond fixed at $1,000.00 for each defendant, to be justified before the Clerk of the Court. SUTTON, Judge.

NORTH CAROLINA—Edgecombe County.
September Term, 1898.

State
against
Mallett & Mehegan.

The defendants move for a new trial:

(1) For admission of incompetent testimony during the trial, and for other errors to which they excepted during the trial.

(2) For that the Court refused to give the jury the instructions as requested by defendants.

(3) For that the Court charged the jury that this indictment was not barred by the statute of limitations, and for other errors in charge, to be hereafter specified.

(4) For that the Court failed to call the jury's attention to the evidence set out in the written evidence taken before Nash, Referee, which was put in evidence by the State and commented on by defendants as tending to prove their innocence, or the affidavit of Dr. Baker, made on October 10, 1895, on which defendants contended that this indictment was barred, nor did the Court call the jury's attention to the defendants' contention on this evidence; for that the Court failed to find the facts on the plea in abatement as requested.

The above paper was filed by the defendants after judgment, and is indorsed "Filed October 1, 1898. G. W. Robbins, Clerk."

29. The additional assignment of error by the defendants in the case tendered by them are as follows:

For that the Court charged the jury:

(a) "A conspiracy is when two or more persons combine or conspire together to do a wrongful act, or to injure any individual, or to do acts which are unlawful or prejudicial to the community; is an unlawful agreement and combination and a conspiracy and indictable."

(b) "This is an unlawful agreement and combination and an indictable conspiracy, if you believe the testimony and it so satisfies your mind beyond a reasonable doubt."

(c) For that the Court charged the jury "that home account, change of name of Mrs. Mallett," was a circumstance to go to the jury to be considered by them as to the guilt of the defendants, and put it to the jury as one of the State's contentions, numbered (3), although he had theretofore ruled this evidence incompetent.

(d) The same as section (28), sub-section 4, ante, except that after the words "Nash, Referee," are inserted the words "and Battle, Referee."

30. What is set forth in section (34), sub-section (b), ante, is to be taken in connection with what his Honor told the jury, in the same sentence, which was, in effect, that a combination of two or more persons to cheat and defraud a person was indictable. See section (32), ante.

31. His Honor recapitulated the testimony verbally, directing their attention to the principal matters; and if there are any portions of the testimony that he failed to mention to them, the defendants' counsel did not, before verdict, direct his attention to such admission.

The State insisted that a combination of two or more persons to secrete or dispose of the property of a debtor for the purpose of defrauding his creditors was indictable. The defendants insisted that this was not so, urging that a conspiracy was a combination to do some indictable act only. The Court's decision was adverse to the defendants on this point and the jury were so instructed in the charge.

Nothing was stated verbally to the jury varying in any respect from the legal proposition submitted in writing.

32. The judge submitted the contentions of the respective parties as best he could gather the same. In regard to the State's contentions, the judge, in verbally rehearsing the evidence, told the jury that the facts relied on by the State must be proven, and must satisfy the jury of the existence of the conspiracy alleged, and that they must give the defendants the benefit of all reasonable doubt. This applied to the matter of the ledger of Mallett & Mehegan and its alleged alteration.

33. In regard to the statute of limitations, the State contended that a conspiracy to cheat and defraud was not within the statute, Code, section 1177, because—

1. It came under the head of deceit; and

2. It was not now a misdemeanor but a felony; and further, that even if that crime did come under the statute, it was committed in a secret manner, and that the executors, Baker and Adams, did not discover the principal overt act relied on, to-wit, the fact that Roberson, Parker, Bell and Owens were fictitious persons until subsequent to the examination in the supplementary proceedings; this is, within two years before the finding the first bill. Dr. Baker so testified, and he was not contradicted.

A case on appeal having been tendered to the undersigned on November 7, 1898, by the defendants, this is a counter case on appeal prepared by the counsel for the State, instead of a statement of exceptions to appellant's case.

WALTER E. DANIEL,
Solicitor.
GILLIAM & GILLIAM,
JACOB BATLE,
For the State.

Upon disagreement of counsel, upon due notice to counsel on both sides, they appeared, both being represented by counsel, at Fayetteville, N. C., February 24, 1899. After hearing the argument and various contentions, the case as stated above and foregoing on these sheets marked "A," together with the statement of evidence and proceedings on the typewritten copy marked "B," are adopted by me and settled as the appeal in this case, with the following additions and amendments, which shall be a part of the case on appeal as settled by me, viz:

1. The entire affidavit of Dr. J. M. Baker, of date October 10, 1895.

2. The written evidence introduced by defendants as had before E. Pennington, Referee, in supplementary proceedings, offered and introduced by defendants upon the plea of abatement.

3. The entire evidence had and taken before S. S. Nash, Referee, or such portions thereof as counsel on both sides may agree upon.

4. The letters written by Dr. J. M. Baker to the fictitious persons (to whom goods were alleged to have been shipped by defendants) were returned to Dr. Baker in October, 1895, as not having been called for by the addressees.

5. The additional assignments of error by the defendants, as set out in the State's counter case, page 31, article 29.

6. The contentions of defendants, on page 29 of their case on appeal, and in addition those which appear in counter case of State, page 31, article 31.

The typewritten copies "A" and "B," with these amendments and additions, will constitute the case settled on appeal by me, the counsel having disagreed.

February 25, 1899.

THOMAS H. SUTTON,
Former Judge First Criminal Circuit Court, N. C.

STATEMENT "B."

(The first five pages of this statement, being verbatim et seriatim the same as in Statement "A," are omitted.)

Dr. Julian M. Baker testifies as follows: "With Miss Ida M. Adams, I am administrator of Mrs. M. L. Woolard. She died in September, 1893; her husband, Solomon Woolard, died in 1889. Mallett & Mehegan were in partners in the mercantile business at the death of Mrs. Woolard. H. T. Latham was a clerk for Mallett & Mehegan. Latham is also a nephew of Mallett. I found among the papers of Mrs. Woolard a note of Mallett & Mehegan for $6,636.39, with interest at 8 per cent from January 25, 1890. (The contract between Mallett & Mehegan and Mrs. Woolard, Administratrix, is read by the witness.) This debt was due when I qualified as administrator of Mrs. Woolard; and in pursuance of the terms of the contract, I demanded of Mallet & Mehegan a statement of their financial condition. This demand was made before the supplementary proceedings were taken out. The demand was made prior to January 1, 1894, and this was before litigation."

The defendants object, because this demand and statement by Mallett & Mehegan, they were examined in supplementary proceedings. The objection overruled, and the defendants except.

4. The witness, Dr. Julian M. Baker, continued as follows: "This statement was under oath, and I saw it last when the matter was before Thos. H. Battle, Referee. (This was not in the supplementary proceedings.) I have made diligent search among my papers, in my office, in my attorney's office, and among my papers relating to the estate, of which I am administrator. I have searched for this paper a number of times and can not find it."

The State is allowed to prove the contents of said state-

ment. Defendants object, because defendants were examined in supplementary proceedings. Objection overruled. Exception by defendants.

5. The same witness continued as follows: "This statement showed that Mallett & Mehegan were worth $17,000.00 over and above all liabilities. The statement showed that they had cash on hand, $4,400.00, and that the indebtedness against them was about two thousand dollars, excluding what might be due to the Woolard estate. This statement was headed 'General Statement of Mallett & Mehegan,' and showed that they [were] worth, net, $17,000.00. In the reference trial before Thos. H. Battle (July 25, 1895), Mehegan was a voluntary witness in his own behalf. He testified then in regard to this statement. Mehegan was examined about this statement in the supplementary proceedings before the Clerk, about January 1, 1896."

The defendants object. Objection overruled. Exception by defendants.

6 Dr. Julian M. Baker testified further as follows: "Mehegan's testimony before Battle, Referee, was that Mallett & Mehegan were abundantly able to pay this debt. The compromise agreement was made and reported by T. H. Battle, Referee. The claim due the Woolard estate was $11,000.00, and the agreement or compromise to settle was about seven thousand dollars. The compromise agreement ended the matter before Battle, Referee. Mallett handed me a letter signed by Mallett & Mehegan. The following is a copy of same:

"'Tarboro, N. C., October 10, 1895.

"'Dr. J. M. Baker, Miss Ida M. Adams,
"'Administrators of M. L. Woolard.

"'Dear Sir and Miss: In settlement of your claim against us, we respectfully submit the following proposition, viz:

1. The report of the referee shall be four thousand dollars ($4,000.00), instead of five thousand nine hundred and fifty-two and seventy-three one-hundredths dollars ($5,952.73). To pay the amount ($4,000.00) we will deliver into the hands of the Clerk of the court, or cause to be delivered into his hands, on the day the report of the referee is affirmed and docketed, the following bonds and mortgages, which we will assign to you, viz:

"'Note against O. Burnett, and accrued interest to October 15, 1895,	$39.49
"'Note against M. H. Pippen, and accrued interest to October 15, 1895,	283.79
"'Mortgage against B. F. Havens, and accrued interest to October 15, 1895,	50.00
"'Five notes against J. A. Warren, secured by deed of trust,	696.83
"'We deduct $10.00 of accrued interest on above to equalize 6 per cent. with 8 per cent interest.	
"'Mortgage against W. T. Gray, Jr., and others, with accrued interest to October 15, 1895,	260.00
	1,330.11
"'Deed in trust for your benefit, by J. P. Mallett and wife, on Mallett's property, worth,	800.00
"'Cash,	2,412.39
	4,542.50

"'The debts and cash offered will amount to $4,542.50, which, when delivered to the Clerk of the Court, shall be in full satisfaction of your claim, principal, interest and court costs.

"'2. The release and discharge of C. B. Mehegan as agent and attorney for M. L. Woolard, Executrix, and M. L. Woolard, individually, as agreed, to be executed and

delivered to C. B. Mehegan when settlement as hereinbefore named is made with the Clerk of the court.

"'3. The report of the referee is to be recorded in full when $4,000.00 is substituted for $5,952.73.

"'We desire that the release and discharge to be executed by you to C. B. Mehegan shall set forth the period of time which he occupied such position, the amount of receipts and disbursements as a whole which he made (as per statement of Mr Gaskill), and the books and papers were examined by an expert accountant and found to be correct.

"'As we have the assurance that we can borrow the money if the proposition is accepted, we make it in good faith and request that you let us hear from you at your earliest convenience, and oblige,

"'Yours very truly,

"'MALLET & MEHEGAN.

"This letter was handed to me just before the Court at which the compromise judgment was to be rendered. In consequence of this letter I applied for a warrant of attachment against the goods and property of Mallett & Mehegan. The sheriff had to break their safe open; he could not get in the same any other way."

Dr. Baker was asked this question: How much money was found in the safe?

This was objected to by the defendants. Objection overruled. Exception by defendants.

Dr. Baker, in answer to the question, said, "About one hundred dollars is my recollection: may be more or less."

7. The witness continued, as follows: "I had a conference with Mallett & Mehegan at their instance in Mr. Gilliam's office. There was some dispute as to the calculation of interest, they contending that interest must be computed every thirty days on their store account against

Mrs. Woolard. This was the main point of difference between us. I agreed to settle upon their basis, and I afterwards called upon them repeatedly to settle in that way, and they refused."

The defendants object to this testimony. Objection overruled. Exception.

"Mehegan was examined before Battle, Referee. He was asked if, when they attended the conference with me to get at the basis of settlement, they did so in good faith, and he said he did not, and that it was decided between him and Mallett to refuse to pay this debt and to force me to sue and get what I could. Mehegan made a claim for services, $800.00 a year for four years, services rendered the Woolard estate. This claim was not made at our conference, but subsequent to it. Prior to that time he had not made any such claim against the estate. Mallett, after the conference, refused to talk to me about this debt."

The defendants object to this evidence.

Dr. Baker was asked this question by them: State whether or not you heard this book (which is a book of Mallett & Mehegan, found by sheriff when he levied the attachment), referred to by Mallett & Mehegan at the examination before Mr. Nash when they, the defendants, offered themselves as witnesses in their own behalf. (The sheriff caused the personal property exemption of Mallett & Mehegan each to be allotted, and each of them appealed from the allotment and said cases in the Superior Court on appeal were referred to S. S. Nash, and he heard said cases in Tarboro in September, 1897.)

This examination before Nash subsequent to the supplementary proceedings.

The witness had stated that the first time he heard this book referred to was at the supplementary proceedings examination before Clerk.

The defendants object to this evidence, because the tes-

timony now offered was subsequent to the examination in the supplementary proceedings. The objection was overruled. Exception by defendants.

It was admitted that the testimony now offered was the declarations of the defendants before Nash, Referee, when the defendants offered themselves as witnesses voluntarily in their own behalf.

8. The same witness proceeded, as follows: "This is a day-book of Mallett & Mehegan. At the examination before Mr. Nash, Mallett said it was a counter-book and that the entries were transferred to the ledger-book. The entries are in Mehegan's handwriting, viz:

"E. T. Roberson, Robersonville, October 4, 1895, verb. or., - - - - - -	$189.09
"T. H. Parker, Rocky Mount, October 5, 1895, verb. or., - - - - - -	148.77
"S. W. Bell, Kelford, October 7, 1895, verb. or.,	168.51
"M. H. Owens, Williamston, October 9, 1895, verb. or., - - - - - - -	129.56
	"635.93"

The defendants ask that an exception be again made, and the Court remarked that their objection was already stated more than once and was ample to protect the defendants, and that it was necessary to write down another objection relating to the same matter more than once objected to and exception taken and noted.

To this the defendants except.

9. The witness then proceeded: "The witness, Mallett, said that the goods were shipped to E. T. Roberson and the other parties above set forth. The abbreviation 'O. N.' means that the goods were shipped to order and that they were to be notified. I know of my own personal knowledge that there is no such person as S. W. Bell at Kelford, N. C."

The defendants object and allege that the statements of the defendants before Nash, Referee, were not voluntary because, while they did offer themselves as witnesses in their own behalf, yet upon cross-examination, when this examination was gone into and this information elicited, they were not voluntary witnesses. Objection overruled. Exception by defendants.

10. The witness, Dr. Julian M. Baker, proceeded as follows: "Mehegan said he had heard of S. W. Bell, but this shipment was not intended for him. He said that the other persons were fictitious. The letters 'O. N.' meant, so Mallett & Mehegan said, 'order notify,' that is, to deliver to the consignee of B-L. and B-L. was made out to Mallett & Mehegan. This was all on the examination before Nash, Referee. Mallett said that he had no accurate knowledge of the shipment. By that he said he meant he did not pack or mark them, that is, the goods, that he saw them packed and shipped. Mallett said he did not know any of these parties to whom the goods were shipped. Mehegan said he redeemed and sold the goods sent to Robersonville. Mallett said he went and got the goods in Rocky Mount. Mehegan said he sent Latham to Kelford and got the goods sent there. Mallett & Mehegan said they got these goods some days after the attachment, and they sold some and shipped some to Greenville and sold them, put the money in their pockets and spent it. Mehegan said he shipped these goods to fictitious persons to get the money to pay me. They paid me nothing. The examination in the supplementary proceedings and that before Nash, Referee, were nearly alike. I am giving in my testimony that which came out in their statement before Nash, Referee There is $4,500.00 still due to the Woolard estate, due under the basis of the compromise agreement. The book now shown me is the ledger of Mallett & Mehegan used by them, and before Pennington, Clerk,

in the supplementary proceedings. One of the defendants was examined as to the contents of this book, and it was taken by the sheriff under the levy of the attachment. Afterwards, the sheriff and I carried this book to Mr. Gilliam's office. The sheriff, under attachment proceedings, garnisheed the debts of account in the book, the ledger."

The defendants object to the contents of the book being proven, because the book was before the Clerk in the supplementary proceedings. The State claims and says the information now asked for was obtained by the witness before the supplementary proceedings were instituted. They propose to ask the witness as to such information only, not as to any information obtained by him upon the examination in the supplementary proceedings. Objection overruled. Exception by defendants.

11. The account of Mrs. Mallett was examined by the witness before the supplementary proceedings were instituted, and the State offered the account which is on the books as made by defendant, prior to litigation. The account of Mrs. Mallett of ledger (this account was examined into before referee in supplementary proceedings and defendants examined upon it). The account of Mrs. Mallett, at pages 108 to 109, 359, 375, 376, 377, 526, 630, 631, 676, 717, the witness, Julian M. Baker, was examined about this account. The said book (ledger) will be sent to the Appellate Court, that is, the Superior Court. There was evidence tending to show: That C. B. Mehegan lived with his sister, S. Mallett, and her husband, the said John P. Mallett; and a long account in the ledger of Mallett & Mehegan for family supplies, etc., simply headed "Home Account," had been changed so as to make it appear to be against Mrs. John P. Mallett, and this account was credited in July, 1895, with large amounts, as follows:

"By Board of C. B. Mehegan to July 1, 1895,	1,237.50
"By Board of Clerk, H. T. Latham, - -	1,218.75
	$2,456.25
"By account of John P. Mallett and family ('and family' erased in the ledger) to July 1, 1895,	3,300.00
"And on September 2, 1895, by board of J. P. Mallett for July, August and September, -	150.00
"By board of Mallett and Latham, for July and August, - - - - - -	75.00
"And for September, - - - - -	37.50
"By board of Mallett, for September, - -	50.00
	6,068.75

The ledger shows cash paid by Mallett & Mehegan to Mrs. John P. Mallett, on July 19, 1895, $873.04; that the heading of this account in the ledger had on many pages been altered. Before Nash, Referee, Mehegan said he had paid to Mrs. Woolard $1,000.00 in cash. The account against Bell and the others on the day-book do not appear in the ledger. The defendants aver that the words "J. P.," preceding Mallett was the subject of examination in the supplementary proceedings, and that this evidence and the book (ledger) ought to be excluded. The witness then stated that he noted all these accounts and had information concerning them before the examination in the supplementary proceedings were instituted, except the words "J. P.," with Mrs. and the letter "S" following Mrs., and that he did not notice that till now.

The Court excluded all testimony based on information received from the examination of defendants in the supplementary proceedings, and allowed only such as was had by the witness before the institution of the supplementary proceedings, and the witness proceeded: "The defendant Mehegan stated before Nash, Referee, that he sent Latham

to Kelford to get the goods; that Mallett had particular direction in regard to selling the goods. I did not get any information that there was no such person as S. W. Bell and that the shipments were to fictitious persons until I went to Kelford and inquired for Bell. This was after the examination in the supplementary proceedings."

(It was not contradicted that Dr. Julian M. Baker's visit to Kelford was within two years before the finding of the first bill of indictment.)

The witness proceeded as follows: "I found at Kelford that there was no such person in existence as Bell, and afterwards, pursuing the inquiry, I learned that there were no such persons as Owens and others to whom the goods were shipped on the alleged verbal orders. Up to this inquiry I thought these were real and genuine sales. I began to trace and search for these goods shipped to S. W. Bell and others before the supplementary proceedings were begun. I had the information from the small day-book as to these shipments, and thought then they were real shipments, but found out they were all fictitious transactions. I wrote letters to Rocky Mount, Williamston and Robersonville, addressed to the parties named, and said letters were returned to me, as they were not called for. These defendants were examined in the supplementary proceedings about the judgment in the Superior Court. They had previously been examined [before] this before Thos. H. Battle, Referee. They were examined in the supplementary proceedings about their ability to pay the judgment. The index figures (in the ledger of Mallett & Mehegan), relating to Mr. Mallett's account, show one or more entries in different ink of recent writing and added afterwards. The 2 and 6 looked like they were made in the same ink. (The ledger and index are admitted in evidence and exhibited to the jury by the defendants.) Fifty dollars, I think, is a fair price for the support of a

man and his wife and 4 children in Tarboro per month." (The letter marked "a," from John F. Shackelford, is admitted in evidence.)

The witness, Dr. Julian M. Baker, was asked this question: Did you go before the grand jury when this bill was found, and did Mr. H. A. Gilliam go with you?

Answer. We both went before the grand jury at different times.

Question. Did you carry with you before the grand jury, when you testified there in this bill of indictment, the evidence taken in the supplementary proceedings?

The question was objected to by the State, for the reason that all the testimony offered by the State, based upon information or evidence, oral or written, obtained upon the examination in the supplementary proceedings, had been excluded by the State. Objection sustained. Defendants except.

12. The defendants' counsel here asked the Court to find that the charge in the bill of indictment is the same as the evidence contained in the examination of the defendants in the supplementary proceedings. The Court held that it was impossible to do so, for the reason that the bill of indictment did not set forth evidence and need not do so, and there was no way for the Court to find the facts as asked for by the defendants' counsel.

13. C. L. L. Cobb, the witness for the State, testified as follows: "I have been living at Kelford, N. C., for six years last December. I am in the hotel and livery business. There is no such person as S. W. Bell at Kelford or in that vicinity. I was living in Kelford in October, 1895. I met a man introduced to me as 'H. T. Latham.' I met him at the depot, morning train. There were goods marked 'S. W. Bell.'"

The defendants object to that part of witness' testimony relating to having met a man introduced to him as

"H. T. Latham." Objection overruled. Exception by defendants.

14. A book was here exhibited to the witness, and he proceeded as follows: "This book is my hotel register. The person I saw as H. T. Latham registered in the name of H. T. Thomas or H. T. Latham. Both names are written there on the 16th of October, 1895. (The word 'Latham' being written over the word 'Thomas.') Latham offered the goods sent to S. W. Bell for sale."

The defendants object because this matter was examined about in the supplementary proceedings after the witness saw Latham at Kelford, and because H. T. Latham is not on trial. Admitted for the reason that it is heretofore in evidence that Mehegan, one of the defendants, stated before Nash, Referee, that he, Mehegan, sent Latham to Kelford to sell the goods. Exception by defendants.

The witness, Cobb, proceeded: "Latham offered to sell me the goods marked to S. W. Bell, and said he was going to try to sell them."

"Mr. Mallett stayed at the store of Mallett & Mehegan and gave his attention to it. (The witness then testified as to the appearance of the ledger which was before him, page 526, Home Account, that changes had been made in the account.) I do not say that he stayed at the store every day, but I do say that he stayed there generally." (This paragraph of six lines must be a part of Dr. Baker's testimony, misplaced here. C. S. C.).

15. E. Miller, witness for State, testified as follows: "I know the defendants. Mehegan showed me five $5.00 pieces in gold, and after that he showed me many kinds of money. This was in 1897."

The defendants object. Objection overruled. Exception by defendants.

16 The said witness proceeded: "And in January, 1898, he said he had a whole lot of money now in his

pocket, and took it out and showed me a large roll. I said it was $1-dollar bills, and he said they were $20-dollar bills. He said he had twice as much in another pocket and three times as much coming by express that day. He said some people said he had no money, but that was his business, that no one knew, and it was no one else's business. After this, Mehegan, when I was summoned as a witness, asked me what I was going to say. I told him what I was going to say. I told him I should tell only what I knew. He said people talked too much. He called me in a room and said this."

Cross-examination.—"I came from Russia. I have been here three years, going on four. I went into business here. I borrowed some money through Mehegan. Mehegan said the gold money belonged to his aunt. My wife is in business now on her own account. This money was shown me about the time the Citizens Bank was started. He said a lot of people said he had money, but it wasn't true. Mehegan told me if I was summoned to tell all I knew. This money was shown me just before his brother started the bank."

NORTH CAROLINA—Edgecombe County.
Circuit Criminal Court, Special Term, Sept. 26, 1898.

State
against
J. P. Mallett and C. B. Mehegan.

The defendants put the evidence taken in the supplementary proceedings in evidence before his Honor, Judge presiding, upon their preliminary plea, in which that [they] state: "That every fact alleged in the indictment in this case, the defendants were each fully examined about in

said supplementary proceedings," and especially called the Court's attention to page 3 of the evidence taken in said supplementary proceedings, in which the object of said examination is stated by plaintiff's counsel to be "To show the defendants went to work in a systematic way for purpose to cheat J. M. Baker and Ida M. Adams, Administrators of M. L. Woolard, etc., and to fraudulently dispose of their property to prevent the recovery of their judgment, and pages 3, 7, 8, 10, 11, 12, 13, 14, 88, and others, which defendants say will fully disclose to the Court that the same evidence was elicited from the defendants in said supplementary proceedings as has been placed before the jury in this trial, and ask the Court to find the fact as to the truth of the facts alleged in said preliminary plea. The defendants further offer the Court the record of the court to show the evidence taken before S. S. Nash, Referee, and which has been offered in evidence by the State in this case, and ask the Court to find the fact whether or not this evidence is not in substance the same evidence elicited from the defendants in the supplementary proceedings; and the defendants were not asked by plaintiffs to elicit the evidence before Nash, if they did not testify to these facts in supplemental proceedings, and they were not compelled to answer by the Court upon their objection, and if this question were not pertinent to the issue before said Court, and if the Court should so find, they ask that said evidence be excluded.

J. J. MARTIN,
G. M. T. FOUNTAIN,
Attorneys.

30. The defendants asked the Court to charge the jury as follows:

1. Before the defendants can be convicted upon this bill of indictment, the State must show to the jury, beyond a

reasonable doubt, that these defendants combined and confederated together to do some unlawful act, or a lawful act in an unlawful way.

This was given.

2. That unlawful here means indictable.

This was given.

3. That if the jury should believe that the defendants did combine and confederate together to ship some of their goods off to fictitious persons, to sell and apply the proceeds to their own use, this would not be unlawful, although it should be done secretly and should prevent the plaintiffs Baker and Adams from collecting a debt against them, for they had a right to sell their goods at any time before they were attached, either openly or secretly, and they would not be guilty.

This was declined, and the defendants excepted.

4. That if the jury should believe that C. B. Mehegan shipped these goods without any concert of action or agreement between him and the other defendants, they would not be guilty, for it is the conspiracy to do an unlawful act and not doing the act for which they are indicted.

This was given with the following modification:

Provided, the defendant Mallett had no knowledge or information of the doing of any of these acts, and there was no understanding, agreement or combination to do these acts with intent to cheat and defraud.

Defendants except.

5. That if the jury should believe that the defendants owed Mrs. Mallett money for board, although said board was for the board of her husband and family, and although said board was not due in law, yet they would be (?) guilty of an indictable offense, and you can not convict them upon this indictment.

This was given with the following modification:

Provided, the act of her husband paying his wife board was not done for the purpose of secreting his money or putting it beyond the creditors' reach, and so done with intent to cheat and defraud.

Defendants except.

6. That upon all the evidence you are instructed to find the defendants not guilty.

Declined. Defendants except.

J. J. MARTIN,
G. M. T. FOUNTAIN,
Attorneys.

31. The defendants also filed the following with the judge:

"We insist that conspiracy in North Carolina is a misdemeanor, and as such is barred by the statute of limitations. (State v. Jackson, 82 N. C., 565.) We therefore ask the Court to charge the jury the defendants are not guilty as charged in the bill of indictment."

This was declined, and the defendants excepted.

32. The defendants requested the judge to put his charge in writing, and he did so, as follows:

"A conspiracy is where two or more persons combine or conspire to do a wrongful act, or to injure any individual, or to do acts which are unlawful or prejudicial to the community; is an unlawful agreement or combination, a conspiracy, and indictable. When two or more persons combine, agree and conspire to cheat and defraud any one, here, it is charged, Dr. Baker and Miss Adams, representing the Woolard estate, then it is a combination and agreement and an indictable conspiracy, if you believe the testimony, and it so satisfies your mind beyond a reasonable doubt.

"The acts and declarations of the defendants are evi-

dence for the jury to consider in determining whether or not the defendants did form the conspiracy for which they are indicted. The jury are charged that the acts and declarations of any one of the defendants, although evidence against the party making the same are not evidence against the others, unless you find that there was a common purpose, agreement or understanding existing between them, and, in that case, the acts and declarations of each one of the parties who had the common purpose are competent evidence for the jury to consider as against each one of said defendants who had such common purpose, to unlawfully cheat and defraud Dr. Julian M. Baker and Miss Adams, representing the estate of Woolard. It is not material in an indictment for a conspiracy that the unlawful purpose should be accomplished, as the conspiracy of the illegal combination is the offense, if you are satisfied from the evidence beyond a reasonable doubt that such unlawful purpose or agreement existed. The defendants are entitled to all reasonable doubts, and if you have such reasonable doubts, it is your duty to acquit. But if, upon the whole testimony, the facts, circumstances and surroundings of this case, you are satisfied beyond a reasonable doubt that this unlawful agreement, conspiracy and common design existed to cheat and defraud Baker and Adams, then it is your duty to find them guilty. As to whether this is a felony or misdemeanor, it is not the province of the jury to inquire. That is a question of law reserved for the Court to decide. As to the statute of limitations, I charge you that this indictment is within the legal time, and not barred by the lapse of time." (In the charge on file, the word "existed," in line 8 from the bottom, does not appear.)

State contends:

1. Partners and nephew.
2. Falsified ledger.

3. Home account—change of words—Mrs. J. P. Mallett.
4. Credit to Mrs. Mallett, $6,000.00.
5. Shipping goods to fictitious persons.
6. Participation in that of Mallett & M.
7. Send Latham to sell them.
8. Making way with the goods secretly.
9. Using proceeds for individual purposes.
10. Latham's false registration and his sale of goods for M. & M., sent to an unknown person.
11. The confidential relation between Sol. Woolard and his widow after his death, and Mehegan.
12. Their sworn statement before Clerk Pennington as to their solvency, showing $17,500.00 net, except their debt to Woolard estate.
13. Their agreement as to the amount to be rendered as a compromise judgment.
14. Their refusal to comply with this compromise judgment.
15. Their evasion of Dr. Baker, who is seeking a settlement, and the counter-claim of $3,200.00, set up for the first time before Battle, Referee.
16. Mrs. Mallett, wife of one of the defendants, having possession of a large amount of money, and buying bank stock in her name, after the attachment against the defendants had been instituted.
17. Mrs. Mallett shortly after going into the mercantile business in her own name, and the three, Mehegan, Mallett and Latham, being in and about the store, seemingly in control.
18. That all items of the blotter are transferred to ledger, except the sales of goods to Kelford, Rocky Mount, etc.
19. Latham sent by M. & M. to sell goods and his false registration.

The Court held that this indictment was a misdemeanor.

Judgment was then rendered by the Court as follows:

It is ordered and adjudged that the defendants, C. B. Mehegan and J. P. Mallett, be each confined in the county jail for two years, at the expiration of said term to be discharged upon the payment of the costs according to law.

EDGECOMBE COUNTY—Superior Court.
June Term, 1899.

State
against
J. P. Mallett and C. B. Mehegan.

This cause coming on to be heard before Hoke, Judge Superior Court holding said term, on appeal of defendants from a verdict and judgment had against them in Criminal Court of said county, the Court is of opinion that there was substantial error committed on trial of cause against defendants therein, for that, among other reasons, the facts developed on examination defendants in proceedings supplemental to execution were, over their objections, used to effect their conviction. Both directly in evidence has Dr. Baker and Mr. Henry Gilliam, and indirectly by placing before this jury the evidence of these defendants brought out by cross-examination before S. S. Nash, Referee, in which examination defendants were asked concerning some matters developed in said supplementary proceedings. It is true the case on appeal states that the judge held and so declared that statements made by defendants in said supplementary proceedings were not competent evidence against defendants on this trial; but it is perfectly patent, on inspection of the evidence set out, that the facts brought out on examination of defendants in said supplemental proceedings were necessarily used to develop their evidence before Nash, Referee, and both in this way and in other particulars directly was this exam-

ination in supplemental proceedings used to effect their conviction, contrary to statute.

The Court is also of opinion that judge erred in not leaving jury to question whether the facts constituting crime charged were discovered within two years before action brought, this being a misdemeanor and barred, unless accruing or facts discovered with [within] said two years.

It is therefore adjudged that defendants are entitled to a new trial, and it is ordered that this opinion and judgment be certified to Criminal Court to next term, that new trial may be had pursuant to this judgment.

The State excepts and takes an appeal. Notice waived.

W. A. HOKE,
Judge Presiding.

NORTH CAROLINA—Superior Court.
June Term, 1899.

State
against
J. P. Mallett and C. B. Mehegan, Defendants.

This was a criminal action tried before Sutton, Judge, and jury, at Special Term, September, 1898, Criminal Court, and heard on appeal before Hoke, Judge, at June Term, 1899, Superior Court Edgecombe County. There was a verdict rendered against the defendants at said Criminal Court and sentence had against them, from which they appealed to Superior Court.

Upon hearing said appeal his Honor Judge Hoke granted a new trial to defendants, and rendered judgment as appears of record. From this judgment the State prayed and was allowed an appeal in open court. Notice waived, and State allowed thirty days within which to serve and file

case on appeal. Defendants allowed thirty days thereafter to serve and file counter case.

In the case on appeal, served in apt time, the State assigns the following errors, which it asserts and claims were made by the Court in granting said new trial and in the judgment entered on said appeal: The State assigns for error the finding and conclusion of his Honor, that the facts developed on examination of the defendants in proceedings supplemental to execution were over the objections of the defendants, and were used to secure their conviction; that the evidence of defendants was brought before Nash, Referee, on their cross-examination; that the findings of Sutton, Judge, as to the exclusion of all evidence developed in supplemental proceedings, are overruled by his Honor, Hoke, Judge; and that his Honor, Sutton, Judge, committed error in not leaving to the jury the question whether the facts constituting the crime charged were discovered within two years before institution of this prosecution, and that the crime charged was a misdemeanor and barred within two years after the discovery of the facts.

The record proper, including the judgment of Judge Hoke, entered on appeal, and also the cases on appeal prepared by judge Criminal Court, being the case on appeal and amended case, as made by said judge, with the evidence, exhibits, exceptions, etc., which accompany the same, together with this statement, shall constitute case on appeal to Supreme Court.

Above is settled as case on appeal to Supreme Court by the judge, counsel having disagreed and been duly notified.

W. A. HOKE,
Judge Presiding.

State
against
Mallett & Mehegan.

Clark, J. This is an indictment for "a conspiracy to cheat and defraud," and an appeal therein to this Court by the State from a judgment of the Superior Court overruling the judgment of the Circuit Criminal Court, held in Edgecombe County. In State v. Davidson, 124 N. C., 839, it was pointed out that an appeal should be, in such cases, at the instance of the State; and attention was called to the inadvertence of its Legislature (which alone has the power to prescribe the instances in which the State may appeal) in not amending section 1237, so as to embrace appeals by the State in cases going to the Superior Court from the Western Criminal Circuit. This inadvertence did not occur in the act, chapter 471, Laws 1899, creating the Eastern District Court, section 6, whereof expressly provides for such appeals. Section 23 of said act transferred to the new Eastern District Criminal Court all causes pending in the First Criminal Circuit Court. The judgment of the Superior Court overruled the Criminal Court on two grounds:

1. Because facts developed on the examination of the defendants in supplementary proceedings were used to effect their conviction, contrary to the provisions of Code, section 488 (5), which provides that the answers of a defendant in "supplementary proceedings" shall not be used as evidence against him in any criminal proceeding or prosecution.

2. That the judge of the Criminal Court, having held that this offense was a misdemeanor which, by section 1177 of The Code, was barred only by the lapse of two years from its discovery, he erred in not submitting to the jury whether the facts constituting the crime were discovered within two years before action begun.

As to the first point, a careful inspection of the record and case on appeal, sent up from the Criminal Court to the Superior Court, shows that the judge of the Criminal Court in fact carefully excluded from the jury all evidence of the examination of the defendants in supplementary proceedings and "all testimony based on instruction received from the examination of defendants in such proceedings, and only allowed such as was by the witness before the institution of the supplementary proceedings"; and the same care to exclude such testimony was taken by him throughout the trial. There were proceedings, subsequent to the supplementary proceedings, and entirely independent of them, and for a different purpose, before S. S. Nash, Referee, and T. H. Battle, Referee, at which the defendants offered themselves as voluntary witnesses, and at which it is possible and probable they may have made statements similar to those they had made before the Clerk in supplementary proceedings, but such statements were not privileged and were competent to be given in evidence against them, (State v. Hawkins, 115 N. C., 712), and, indeed, the defendants did not except as to them.

As to the second point, the judge of the Criminal Court rested his ruling upon the ground that the offense, though a misdemeanor, was one committed by deceit, and as the evidence was uncontradicted that the discovery thereof was within two years before the beginning of the prosecution, the offense was not barred. In that view of the case, although the evidence was uncontradicted, the matter, in a criminal action, should have been left to the jury (State v. Riley, 113 N. C., 648), with an instruction that, if the jury believed uncontradicted evidence, that the offense has been discovered within the two years before prosecution begun, the statute of limitation was not a bar. His Honor, however, correctly held, as a matter of law, that the prosecution was not barred by the lapse of time, and his having given a wrong reason therefor will not vitiate the ruling.

Up the Act of 1891, chapter 205, in this State, we followed the somewhat arbitrary common-law rule as to what crimes were felonious and what were misdemeanors; and under that conspiracy, and even such grave crimes as perjury and forging, were misdemeanors. The Act of 1891, North Carolina, adopted the rule now almost universally prevalent, by which the nature of the punishment determines the classification of offenses; those which may be punished capitally or by imprisonment in the penitentiary are felonious (as to which there is no statute of limitations), and all others are misdemeanors, as to which prosecutions in this State are barred by two years.

The Code, section 1097, provides that misdemeanors created by statute, when no specific punishment was prescribed, should be punished as at common law; and further enacted that as to misdemeanors they were "infamous, or done in secrecy and malice, or with deceit and intent to defraud, the offender ought to be punished by imprisonment in the county jail or penitentiary." This, by virtue of the subsequent Act of 1891, chapter 205, made the classes of misdemeanors thus subjected to punishment in the penitentiary felonies. The offense charged here, and of which the defendants have been convicted, was done "with deceit and intent to defraud." It is the very essence and substance of it. The Code, section 1097, having given the courts power to punish it with imprisonment in the penitentiary, the Act of 1891, aforesaid, makes it a felony and the statute of limitation is not a bar. The indictment properly charges the offense to have been committed "feloniously." (State v. Purdie, 67 N C., 25; State v. Bunting, 119 N. C., 1200.)

The judgment of the Superior Court must be reversed, and, as nothing further remains to be done in that court, this judgment will be certified direct to the Eastern Dis-

trict Criminal Court in Edgecombe County, that the sentence imposed by that court may be carried into execution.

Reversed.

A PETITION.

IN THE SUPREME COURT—September Term, 1897.

State
against
John P. Mallett and C. B. Mehegan.

The petition of the defendants, John P. Mallett and C. B. Mehegan, respectfully showeth to the Court:

1. That the opinion of the Court was rendered herein on the ... day of October, 1899, and will be certified next Monday to the Circuit District Criminal Court of Edgecombe County, and the sentence of said Court, to-wit, two years confinement in the common jail of Edgecombe County, will be at once put into execution unless relief is granted by this Court.

2. That this indictment was tried before his Honor Judge Sutton at February Term, 1898, of the Circuit Criminal Court of Edgecombe County. Divers exceptions were made to the rulings of the Court, and from this judgment the defendants appealed to the Superior Court. Said appeal was heard at June Term, 1899, of said Superior Court by his Honor Judge Hoke. Judge Hoke passed only on two of the defendants' exceptions, to-wit, the statute of limitations and the admission of evidence elicited in the supplemental proceedings. Upon these points he reversed Judge Sutton and ordered a new trial to be granted. The Solicitor for the State appealed to the Supreme Court. Your petitioners respectfully say that if the Court finds error in these rulings of Judge Hoke, it should go further and examine the other exceptions of the defendants. For,

if the order directing a new trial was right, it does not matter that an improper reason was given for it.

Your petitioners are advised that they have a right to have their whole case considered by the Court. Judge Hoke did not consider the other exceptions, because, in his view of the law, he did not deem it necessary. If the Court now reverses him and the other exceptions are not considered, the defendants will be confined for two years in the common jail of Edgecombe County, because, notwithstanding good grounds of exceptions, the judge below placed his rulings on a wrong ground.

3. Your petitioners call special attention to the following exceptions:

That prior to the beginning of this action an attachment against the property of the defendant was issued at the instance of J. M. Baker, Administrator of M. L. Woolard and of Solomon Woolard, who is the chief prosecuting witness in this case. By virtue of said attachment the Sheriff of Edgecombe County seized the ledger and counter-book of the defendants and have kept possession of them up to this time. At the trial of the present indictment the said books so wrongfully taken from the defendants were offered in evidence.

The defendants objected. The objection was overruled, and the defendants excepted (See record, pp. 44 and 45.)

In this the defendants submit that there was error. For it is, in effect, making the defendants give evidence against themselves under the principles laid down in the case of Boyd v. United States, 116 U. S., 616. At the argument of this case at this term counsel had not found this authority, and his argument did not go upon this ground. Since said hearing he found the said case, and they are advised that the principle and the authority are decisive, and would at once satisfy the Court of the defendants' right to a new trial, if the matter could be brought to its attention.

4. That at the time of the commission of the alleged offense no appeal was allowed to the State from any ruling of the judge of the Superior Court which granted a new trial to a defendant convicted in the Criminal Court. If the statute of 1899, section 6 of chapter 47, grants such appeal the, defendants submit that it is ex post facto and void as to them (King v. Missouri, 107 U. S., 221.)

5. That if such statute has the effect aforesaid it denies to the defendants the equal protection of the laws and is void under the Fourteenth Amendment to the Constitution of the United States, because the defendants in criminal actions tried in the Western Criminal District are exempt from this provision. In that district there is no such right of appeal by the State. (State v. Davidson, 124 N. C., 839.)

6. But the defendants submit that the said statute should be restricted to cases arising after its passage. At the time of the passage of the act the present case had already been tried and appeal taken by the defendant to the Superior Court.

7. That his Honor Judge Sutton overruled the defendants' preliminary plea to the bill of February Term, 1898 (see pp. 6, 7 and 8 of the record); and they expressly asked him to find the facts on said plea (pp. 58 and 59 of record), which he refused to do (pp. 59 and 60 of the record). His Honor, among other things, stated as a reason for not doing so, that the prayer or request was made in writing after three of the counsel had spoken on the merits, and was not therefore in apt time. It is respectfully insisted that his Honor misapprehended the rule. It is true that his Honor had already overruled the plea and the defendants had excepted. But at any time prior to the end of the trial and perhaps to the end of the court, the defendants had a right to have the facts, found with a view to an appeal, and his Honor erred in refusing to find said facts, after being requested to do so.

8. That the counsel of the defendants were engaged in the preparation of a petition to rehear their case when they discovered that the Court had ruled that no such petition was allowed in criminal cases. Your petitioners respectfully submit to the Court that there is no reason in law why the same benefits in practice should not be allowed in cases where a man's life and liberty are involved as in cases involving his property; and if by some inadvertance or oversight on the part of counsel or of the Court, some important principle or authority has been overlooked or a mistake has been made, an opportunity should be presented for correcting it. At any rate, the case is still in fieri and under the control of the Court, and your petitioners are satisfied that the Court will correct any mistake it may have made.

Your petitioners therefore pray that the Clerk be directed to defer the certifying and transmission of the opinion and judgment of this Court till further order in the premises: that the Court will allow them to file with some one of the judges an application to rehear, which he, in his discretion, may approve; that at any rate a reargument be allowed either of the whole case or such exceptions as the Court may deem proper; that notice issue to opposing counsel, and for such other and further relief as may be proper and the nature of the case demands.

And your petitioners will ever pray.

G. M. T. FOUNTAIN,
R. O. BURTON,
Attorneys for Petitioners.

State
against
Mallett & Mehegan.
From Edgecombe County.

Clark, J. After the above opinion of the Court had been filed, but before it had been certified down, the defendants filed a petition for reargument, assigning the following grounds:

(1) Because there were other exceptions raised by the defendants on their appeal from the Criminal Court to the Superior Court, which the judge of the latter court did not pass upon. The defendants should have requested the judge to pass upon those exceptions, and if he had failed to do so, or had held adversely to the defendants, they should have appealed. (State v. Bost, at this term.) In fact, those exceptions are trivial, and the judge passed upon all that merited his attention; but as the practice in this class of appeals was possibly not understood, we will consider now the only exception which the petition to reargue insists the judge of the Superior Court should have passed upon and held in favor of the defendants, i. e., that the sheriff, by attachment, having seized the ledger and counter-book of the defendants, they were put in evidence against them. There certainly was no error in using the defendant's own entries against them. The shoes of a party charged with crime can be taken and fitted to tracks as evidence, and in one case, when a party charged with crime was made to put his foot into the tracks, the fact that it fitted was held competent. (State v. Graham, 74 N. C., 648.) Nor has it ever been suspected that if, upon a search warrant, stolen goods are found in possession of the prisoner, that fact can not be used against him. Here the books came legally into possession of another and the tell-tale entries were competent against the parties making them in the course of their business.

(2) The next exception in the petition is that at the time of the offense the statute allowed no appeal to the State from the ruling of the Superior Court judge. But the defendants had no "vested rights" in the remedies and methods of procedure in trial for crime. They can not be said to have committed this crime relying upon the fact that there was no appeal given the State in such cases. If they had considered that matter they must have known that the State had as much power to amend section 1237 as it had to pass it, and they committed the crime subject to the probability that appeals in rulings upon matters of law would be given the State from these intermediate courts. At any rate, their complaint is of errors in the trial court, and when they appealed to the Superior Court they did so by virtue of an act which provided that the rulings of that court upon their case could be reviewed at the instance of the State in a still higher court. The appeal was certified up to the Superior Court April 1, 1899, and on July 7, 1899, the appeal was taken to this Court. The statute regulating appeals from the Eastern District Criminal Court, chapter 471, Laws 1899, was ratified March 6, 1899.

(3) The petition further urges that it is a discrimination, because the act creating the Western District Criminal Court fails to give the State the right of appeal We do not see how such omission injures the defendants. The State has control of its own legislation as to the cases in which it will permit appeals in its own behalf in its courts. (Hurtado v. California, 110 U. S., 516.)

(4) Lastly, the petition urges that the judge of the Criminal Court refused a request to find the facts upon a preliminary plea in bar because not made till after three counsel had spoken on the merits. That simply raises the question discussed in the previous opinion as to the allegation that evidence of testimony taken in the supplemen-

tary proceedings was used against the defendants. The judge, on this plea, held that it had not been, and all through the trial, at every turn, rejected all evidence of what transpired in the supplementary proceedings. The former, or quashed indictment, was only introduced in reply to the plea that the present indictment was barred by the statute of limitations.

The former opinion of the Court is affirmed, and this will be certified to the Superior Court of Edgecombe County.

Motion denied.

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No. 505. 189

Brf. of Burton for P. C. [illegible]

FILED
MAR 12 1900
JAMES H. McKENNEY,
Clerk

Filed Mar. 12, 1900.

No. 505

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

JOHN P. MALLETT AND CHARLES B. MEHEGAN,
Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA,
Defendant in Error.

Brief of R. O. BURTON, for Plaintiffs in Error, on Motion to Dismiss or Affirm.

No. ----

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1899.

JOHN P. MALLETT AND CHARLES B. MEHEGAN,
Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA,
Defendant in Error.

Brief of R. O. BURTON, for Plaintiffs in Error, on Motion to Dismiss or Affirm.

The facts are not fully stated in the motion by defendant in error. In one particular they are not correctly stated. The plaintiffs in error were tried at September Term, 1898, of the Eastern District Criminal Court for Edgecombe County; were convicted and sentenced to two years imprisonment in jail. At said term they appealed to the Superior Court. The record was certified up by the Clerk of the Criminal Court, on April 1, 1899. Hence the error.

At the time of the alleged commission of the offense charged, and at the time of the trial, the following was the statute law of North Carolina on the subject of appeals by the State:

"An appeal to the Supreme Court may be taken by the

State in the following cases, *and no other*. Where judgment has been given for the defendant:

"(1) Upon a special verdict.

"(2) Upon a demurrer.

"(3) Upon a motion to quash.

"(4) Upon arrest of judgment."

The Code, sec. 1237.

On March 6, 1899, the General Assembly passed an act relating to said Criminal Court (Laws 1899, chap. 471), by which the State was given the right of appeal to the Supreme Court in all cases from the decision of the Superior Court on the appeal from the Criminal Court.

On March 3, 1899, the General Assembly passed an act relating to the Western District Criminal Court (Laws 1899, chap. 371); and by said act no appeal is allowed to the State in such cases—the old law, Code sec. 1237, remaining in force.

The counties composing the Eastern District are Mecklenburg, New Hanover, Edgecombe, Halifax, Northampton, Robeson, Cumberland, Craven, Nash, Warren and Wilson—11 in number.

The counties composing the Western District are Buncombe, Madison, Haywood, Burke, Surrey, Yancey, McDowell, Henderson, Forsyth and Caldwell—10 in number.

There are 97 counties in the State. In all of these except in the Eastern District, the State can only appeal in the four cases enumerated in The Code.

As a matter of history we know that the Eastern District lies mainly in what is known as the negro belt of the State; while the Western District lies in the extreme western part of the State, where the population is mainly white.

The Superior Court granted to the plaintiffs in error a new trial, without passing on all their exceptions. On appeal the Supreme Court reversed this ruling and affirmed

the judgment of the Criminal Court. Thereupon, at the same time, and before the decision was certified down, the defendants (plaintiffs in error) filed a petition or motion, asking a rehearing; and if that could not be had (as it could not be under the practice in North Carolina), then for a reargument, to the end that the Court might pass on the points not passed on by the Superior Court, and which they had a right to have heard.

The Court, without allowing any rehearing or reargument whatever, proceeded to pass on certain points omitted in the first opinion.

In their petition for reargument the plaintiffs in error set forth among other things the following:

"3. That prior to the beginning of this action an attachment against the property of the defendants was issued at the instance of J. M. Baker, administrator of M. L. Woolard and of Solomon Woolard, who is the chief prosecuting witness in the case. By virtue of said attachment the Sheriff of Edgecombe County seized the ledger and counter book of the defendants and have kept possession of them up to this time. At the trial of the present indictment the said books so wrongfully taken from the defendants were offered in evidence. The defendants objected. The objection was overruled, and the defendants excepted. (See record, pp. 44 and 45.) In this the defendants submit that there was error. For it is in effect making the defendants give evidence against themselves under the principles laid down in the case of *Boyd* v. *United States*, 116 U. S., 616. At the argument of this case at this term counsel had not found this authority and his argument did not go upon this ground. Since said hearing he found the said case and they are advised that the principle and the authority are decisive and would at once satisfy the Court of the defendants' right to a new trial if the matter could be properly brought to its attention.

"4. That at the time of the commission of the alleged offence no appeal was allowed to the State from any ruling of the Judge of the Superior Court which granted a new trial to a defendant convicted in the Criminal Court. If the Statute of 1899, sec. 6 of chap. 471, grants such appeal the defendants submit that it is *ex post facto* and void as to them. (*Kring* v. *Missouri*, 107 U. S., 221.)

"5. That if such statute has the effect aforesaid it denies to the defendants the equal protection of the laws and is void under the Fourteenth Amendment to the Constitution of the United States, because the defendants in criminal actions tried in the Western Criminal District are exempt from this provision. In that district there is no such right of appeal by the State. (*State* v. *Davidson*, 124 N. C., 839.)

"6. But the defendants submit that the said statute should be restricted to cases arising after its passage. At the time of the passage of the act the present case had already been tried and appeal taken by the defendants to the Superior Court.

"7. That his Honor Judge Sutton overruled the defendants' preliminary plea to the bill of February Term, 1898, (see pp. 6, 7 and 8 of the record); and they expressly asked him to find the facts on said plea (pp. 58 and 59 of the record), which he refused to do (pp. 59 and 60 of the record). His Honor, among other things, stated as a reason for not doing so, that the prayer or request was made in writing after three of the counsel had spoken on the merits, and was not therefore in apt time. It is respectfully insisted that his Honor misapprehended the rule. It is true that his Honor had already overruled the plea and the defendants had excepted. But at any time prior to the end of the trial, and perhaps to the end of the court, the defendants had a right to have the facts found with a view to an appeal and his Honor erred in refusing to find said facts, after being requested to do so."

The plaintiffs in error filed the following

ASSIGNMENT OF ERRORS:

1. That the Supreme Court erred in holding that the statute of North Carolina, chap. 471, sec. 6, of the Public Laws of 1899, whereby, after the defendants were adjudged by the Superior Court of Edgecombe County to be entitled to a new trial as matter of law, the State of North Carolina was allowed to appeal to the Supreme Court, is not *ex post facto* as to the offence charged, and therefore void under Art. I, sec. 10 of the Constitution of the United States.

2. That it appears by the record that the defendants (plaintiffs in error) were tried at September Term, 1898, of the Circuit Criminal Court of Edgecombe County, and convicted. That divers exceptions were taking to the rulings of the Court, and from the judgment the defendants (plaintiffs in error) appealed to the Superior Court of Edgecombe County. At June Term, 1899, of said Superior Court, the Court passed on two of the exceptions and awarded the said plaintiffs in error a new trial. From this judgment the State of North Carolina appealed to the Supreme Court, which reversed the ruling of the Superior Court. That at the time of the alleged commission of the offence charged and of the appeal taken by the plaintiffs in error in September, 1898, and until the passage of the Act of 1899, chap. 471, sec. 6, Public Laws of North Carolina (to-wit, March 6, 1899), there was no statute allowing an appeal for the State from the judgment of the Superior Court in favor of the defendant.

Wherefore, the plaintiffs in error insist that said Act of 1899, chap. 471, is *ex post facto* as to them, in violation of Art. I, sec. 10 of the Constitution of the United States, and void; and that in the opinion and judgment of the Supreme Court, holding to the contrary, there is manifest error.

3. That there are two District Criminal Courts in the State of North Carolina—the Eastern District Criminal Court, which embraces Edgecombe County, wherein plaintiffs in error reside and were tried; and the Western District Criminal Court (chap. 371, Public Laws of 1899). That in said Western District no appeal is allowed to the State from the order or judgment of the Superior Court granting to a defendant a new trial. (*State* v. *Davidson*, 124 N. C., 839.)

Wherefore, these plaintiffs in error insist that they are denied the equal protection of the laws, contrary to the Fourteenth Amendment to the Constitution of the United States.

4. That the Court holds that the defendants were not made to be a witness against themselves under the following facts, which appear on the record: That an attachment was issued against the property of the defendants, under which the sheriff seized the ledger and the counter book of the defendants. On the trial of this action said books were brought into court, and introduced as evidence against the defendants, over their objection.

The plaintiffs, under rule 21 (*School District* v. *Hall*, 106 U. S., 428), file the following:

Additional Assignment of Errors.

The plaintiffs in error, in addition to the assignment of errors herein, now assign the following errors in the opinion and decision of the Supreme Court of North Carolina:

5. That the defendants (plaintiffs in error) being partners, were indicted for conspiring with their clerk to cheat and defraud certain creditors; and among the circumstances relied on was the shipment of certain goods to several points, "To order notify," which goods were marked in the names of fictitious persons. The shipment

of the goods was shown by a small book of the firm of Mallett & Mehegan, called the counter-book, or day-book. Said book was seized by the sheriff of Edgecombe County in certain attachment proceedings instituted by the prosecutor herein, under an order to attach the goods and property of plaintiffs in error. That the said prosecutor testified that he had the information from the small day-book aforesaid, as to the said shipment; and that the said day-book was put in evidence against the objection of the plaintiffs in error. The Supreme Court of North Carolina held that the plaintiffs in error were not thereby made to be witnesses against themselves.

Wherefore, these plaintiffs in error insist that they were thereby made to be witnesses against themselves, and that thus their privileges and immunities as citizens of the United States have been abridged, and they were deprived of their liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

6. That in the said action one of the circumstances relied upon to convict the defendants (plaintiffs in error) was a certain account between the firm of Mrs. John P. Mallett and the said firm of Mallett & Mehegan, and certain erasures and changes had been made thereon; which account, showing the payment to her of a debt of $873, appear on the ledger of said firm. Said book was seized by the sheriff in the attachment proceedings aforesaid, and was produced upon the trial of this indictment and put in evidence against the defendants therein (plaintiffs in error) over their objection. The Supreme Court of North Carolina held that the plaintiffs in error were not thereby compelled to be witnesses against themselves. The plaintiffs in error submit that this ruling is erroneous.

Wherefore, the plaintiffs in error insist that they were thereby made to be witnesses against themselves, and that

thus their privileges and immunities as citizens of the United States have been abridged, and they are deprived of their liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

7. The plaintiffs in error submit that by this seizure of said books and their admission into evidence, they have been deprived of the privileges and immunities guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, which extends to all citizens of the United States the privileges and immunities enumerated in the Fourth and Fifth Amendments to the Constitution of the United States.

8. That the plaintiffs in error were examined in supplementary proceedings, instituted by the prosecutor, under The Code of North Carolina, secs. 488 *et seq.*, and compelled to answer. By the said statute it is provided that "No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution." The defendants (plaintiffs in error) were fully examined in said supplementary proceedings as to the shipment of said goods, and as to the contents of said books, and among other things as to the account of Mrs. John P. Mallett aforesaid, and upon certain erasures or changes therein. Afterwards questions arose as to the amount of the personal-property exemptions of the plaintiffs in error, and the matter was referred to S. S. Nash, Esq., as referee. At the hearing thereof the plaintiffs in error offered themselves as witnesses, but not as witnesses as to any matter or thing inquired of in said supplementary proceedings; but on cross-examination by the attorneys for the prosecutor herein and against the objection

of the plaintiffs in error, they were compelled to go into the same matters as were gone into in their examination in supplementary proceedings, and the evidence thereon was substantially the same. When the present indictment was tried, the defendants (plaintiffs in error) objected to the use of the evidence elicited in the supplementary proceedings, and as well to the evidence before Nash, Referee. The trial Judge professed to rule out all the evidence in supplementary proceedings, but admitted the evidence before Nash, Referee, which was but a repetition of that already elicited in supplementary proceedings. On appeal to the Superior Court, the judge held that the evidence in supplementary proceedings had been used against the defendants (plaintiffs in error) and awarded the defendants a new trial. On appeal by the State to the Supreme Court, the Court reversed the ruling of the Superior Court and held that the evidence before Nash, Referee, was competent.

Wherefore, the plaintiffs in error submit that they have been made to be witnesses against themselves, and have thereby been deprived of their liberty without due process of law, and that their privileges and immunities as citizens of the United States have been abridged, contrary to the Fourteenth Amendment to the Constitution of the United States.

9. That the defendants moved to quash the indictment, because the evidence taken in said supplementary proceedings was used before the grand jury in procuring a bill. Both the evidence in supplementary proceedings and the evidence before Nash, Referee, was carried by the witnesses before the grand jury. There was no one present to raise objection against its use. The judge stated that it was not allowable for the State to introduce any evidence or any statement made by either of the defendants on examination in the supplementary proceedings, nor was it admissible for any witness of the State to testify to

any fact, knowledge of which was acquired by them through disclosures made on said examination; but said remark was made before the petit jury. Nevertheless, his Honor overruled the motion, but declined to find any facts as set out in the petition for reargument in the Supreme Court. The opinion of the Supreme Court states that this was the identical point raised as to the admission of the evidence in the supplementary proceedings at the trial, and that the Judge had all through the trial rejected all evidence that transpired in the supplementary proceedings; but the proceedings before the grand jury were not before the Judge, and the evidence clearly shows that such evidence was admitted.

Wherefore, these plaintiffs in error submit that they have been made to be witnesses against themselves, and have thereby been deprived of their liberty without due process of law, and their privileges and immunities as citizens of the United States have been abridged, contrary to the Fourteenth Amendment to the Constitution of the United States.

ARGUMENT.

Point One.

The counsel for defendant in error contends that the record does not disclose the fact that any Federal question was raised in the trial of the case in either of the courts in which the case was heard, and that no such question was raised.

1. As to the first, second and third assignments of error, it is patent that the points could not have been raised at the trial in the Criminal Court (September, 1898), because the statutes complained of had not been enacted. Further, the State never asserted any right to appeal or had any occasion to do so until the judgment of the Superior Court.

When the State undertook to appeal from the decision of the Superior Court, it stated, "The State excepts and takes an appeal." When the case on appeal was served on counsel of defendants, which was after the adjournment of the court, they filed exceptions thereto, and among other things said: "The defendants insist that the State has no right to an appeal in this case, and therefore the record should not be sent to the Supreme Court." This necessarily referred to the constitutional grounds, because the statute gave the appeal. But there was no Court then to pass on the point. In the Supreme Court, the original and only brief of Mr. Fountain for defendants, in discussing the right of appeal, says: "But if chapter 471, Acts of 1899, should apply in term to this case, defendants insist it is contrary both to the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States."

So, in the use of the evidence in supplemental proceedings, the brief says, among other things, "The gist of this offense would seem to be the shipment of goods to fictitious persons, and the payment to Mrs. J. P. Mallett of $873 for board, as she claimed. Now the ledger containing Mrs. Mallett's account, and the counter-book with shipment of goods to order notify, were taken from defendants by the sheriff, and they were fully examined into in supplemental proceedings, and defendants examined upon them. * * * On page 18 it appears that this book (counter-book) was first heard of in examination in supplemental proceedings, in which evidence it fully appears that the shipment was made to order notify or fictitious persons. * * * Appellees insist that this evidence was incompetent, and Judge Hoke's ruling should be sustained. Code, sec. 488, provides: 'No person shall refuse to answer,' etc., 'and answers not used against him,' etc. What does this mean? Certainly not that the party shall

be required to furnish facts from which his enemy may forge a chain to catch him in the meshes of the criminal law. It is provided by the Constitution of the United States, Art. V, Amendments, and Constitution of North Carolina, Art. I, sec. 11: 'No person shall be compelled to be a witness against himself in a criminal case.' Now, sec. 488, sub-sec. 5, of The Code, must protect the witness as fully as he is protected under the Constitution and the common law, otherwise it would be unconstitutional. But our Court holds this act constitutional, and in the same decision decides that it protects as fully as the Constitution, for, says Smith, C. J., in *LaFontaine* v. *Underwriters*, 83 N. C., 142: 'We are clearly of opinion that he is protected from the consequences of the discovery and the facts eliminated can be given in evidence against him in no criminal prosecution to which they are pertinent.' Note the facts eliminated can not be given in evidence. This must be so, for if the plaintiffs should compel defendants upon supplemental proceedings to disclose certain facts, and then upon indictment offer to prove those facts, alleging that he could prove them by other witnesses, not using the evidence taken and be allowed to do so; this law would be a delusion and a snare to the defendant, and entirely abrogate the Constitution in this respect. But on page 143 of the same case the Court says: 'The answers of the witness can not be used against him in any criminal proceeding whatever, and his constitutional rights, etc., are maintained intact and in full.' So there can be no doubt the defendants' constitutional rights are fully preserved. What are they? They are fully discussed in *Councilman* v. *Hitchcock*, 142 U. S., 547, 35 L. Ed., 1110, bottom page; *United States* v. *James*, 26 L. R. A., 419."

When the petition for reargument was presented, the defendants explicitly and in detail raised the points set forth in the first four assignments of error. This petition

is not to be taken as a petition for rehearing—the Court declined to allow it to be so treated, and refused to reexamine the questions already passed on; but it did, while the case was *in fieri*, and before the opinion was certified down, look into and pass upon certain of the omitted questions. So that it stands as an original hearing; and none of the cases cited in the brief of the State's counsel have any application. In *Miller* v. *Railroad Co.*, 168 U. S., page 131, the point was set up a year after judgment; and in *Duncan* v. *Missouri*, 152 U. S., page 377, the point was raised after the rehearing.

Dewey v. *Des Moines*, 173 U. S., 193, does not in any wise sustain their contention.

"The Court must be able to see clearly from the whole record that a provision of the Constitution or act of Congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied. * * *

"Nor does the record herein show by clear and necessary intendment that the Federal question must have been directly involved, so that the State Court could not have given judgment without deciding it. In such case it has been held that the Federal question sufficiently appears.

"Although no particular form of words is necessary to be used in order that the Federal question may be said to be involved, within the meaning of the cases on this subject, *there must be something in the case before the State Court which, at least, would call its attention to the Federal question as one that was relied on by the party, and then, if the decision of the Court, while not noticing the question, was such that the judgment, by its necessary effect is a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law.*" (Pp. 198, 199.)

"No particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the State Court in such a manner as to bring it to the attention of that Court."

Green Bay, etc., Co. v. Patten Paper Co., 172 U. S., 58, 67.

"'If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the State Court could not have given judgment without deciding it, that will be sufficient;'" citing *Powell* v. *Brunswick Co.*, 150 U. S., 433, 440.

It would be difficult to call to a Court's attention the Federal question more strongly than was done by the petition, which relied upon "the principles laid down" in Boyd's case. "For it is in effect making the defendants give evidence against themselves under the principles laid down in *Boyd* v. *United States*, 116 U. S., 616. At the argument of this case at this term counsel had not found this authority, and his argument did not go upon this ground. Since said hearing he found the case, and they are advised that the principle and the authority are decisive." What principle? The principles enunciated in that case—the right of the citizen to be secure in the enjoyment of his fundamental Federal rights as enumerated in the Fifth Amendment, and now secured to all citizens of the United States under the beneficent provisions of the Fourteenth Amendment. Analize it for a moment: A defendant asks the State Court to protect him from the abridgement of his fundamental rights—that he be not made to be a witness against himself; and he refers, for support of his position and the definition of his rights, to the most thorough discussion of those rights as based upon

the Federal Constitution, to be found in the books. Yet it is urged that this is a claim to protection under the State Constitution, which has the same language. It is a claim to the *principles enunciated in Boyd's case*, which are Federal. It is surely sticking in the bark to confine his claim to the State law. The refusal of the right, of itself, necessarily involves the Federal question. The right of protection against self-accusation, which I contend is guaranteed under the Federal Constitution, is necessarily denied by a decision which compels the defendant to be a witness against himself. The matter then was called to the attention of the State Court, and it denied the protection. The guaranty of the Federal Constitution was at once set at naught.

It seems to me that, at any rate, the Court clearly having jurisdiction, should see to it that the rights of a party to the protection of the Federal Constitution, brought to the attention of the State Court, should not be ignored on any question of verbiage or insufficient statement. (Mr. Justice Field, 144 U. S., page 359.)

Point Two.

The statute giving the right of appeal to the State is ex post facto as to this case, and void under Art. I, sec. 10, of the Constitution.

In *Kring* v. *Missouri*, 107 U. S., 221, it was held that any law is an *ex post facto* law, within the meaning of the Constitution, passed after the commission of a crime charged against a defendant, which, in relation to that offense or its consequences, alters the situation of the party to his disadvantage.

To the same effect is *United States* v. *Hall*, 2 Wash. (C. C.), 366.

"In *State* v. *Keith*, 63 N. C., 140, the Supreme Court

of that State held that a law repealing a statute of general amnesty for offenses arising out of the rebellion was *ex post facto* and void, though both statutes were passed after the acts were committed with which defendant was charged."

This case is thus cited in Kring's case as authority; and its principles seem to be approved, as well, in the dissenting opinion.

In *Thompson* v. *Utah*, 170 U. S., 343, 351, 352, it is said: "It is not necessary to review the numerous cases in which the Courts have determined whether particular statutes come within the constitutional prohibition of *ex post facto* laws. It is sufficient now to say that a statute belongs to that class which, by its necessary operation and 'in relation to the offense, or its consequences, alters the situation of the accused to his disadvantage.' * * * Of course a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed. * * * 'The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it can not lawfully, we think, in doing so, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.'" Citing Cooley Cons. Lim.

That the right in the present case is a substantial one is apparent, when we consider that if the old law is in force, the plaintiffs in error get a new trial; if the new applies, they stand convicted of a felony, with consequent disfranchisement, and must spend two years in jail.

Merely calling the new statute a change in the law of procedure does not alter the rule.

It is said in *Kring* v. *Missouri:* "But it can not be sustained without destroying the value of the constitutional

provision: that no law, however it may invade or modify the rights of a party charged with crime, is an *ex post facto* law within the constitutional provision, if it comes within either of these comprehensive branches of the law designated as pleading, practice and evidence.

"Can the law with regard to bail, to indictments, to grand juries, to the trial jury, all be changed by State legislation after the offense committed, to the disadvantage of the prisoner, and not held to be *ex post facto* because it relates to procedure, as it does according to Mr. Bishop?

"And *can any substantial right* which the law gave the defendant at the time to which his guilt relates, be taken away from him by *ex post facto* legislation, because, in the use of a modern phrase, it is called a law of procedure? We think it can not."

POINT THREE.

The change of the statute law, whereby an appeal by the State is allowed in the Eastern District, but denied in all other portions of the State, is a denial of the equal protection of the laws, which is forbidden by the Fourteenth Amendment.

It is true that the Court has said that the States have a certain power of classification, and "that if the law deals alike with all of a certain class, it is not obnoxious to the charge of a denial of equal protection." But such classification can not be made arbitrarily. The classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Gulf, etc., Railway Co. v. Ellis, 165 U. S., 150, 155.

Mr. Justice Brewer, in delivering the opinion of the Court, on page 156, quotes the language of Judge Baxter

in *Dibrell* v. *Morris's heirs*, 15 S. W. Rep., 87, 95: "We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary."

In *Janesville* v. *Carpenter*, 77 Wis., 288, a statute authorizing suits for injunction to be maintained in favor of certain parties under circumstances differing from those which obtained in respect to all other suits of a similar nature, was likewise held to be void, as discriminating and class legislation, in violation of the spirit of the Constitution, and contrary to public justice.

165 U. S., 164.

In *Hayes* v. *Missouri*, 120 U. S., 68, 72, there was a substantial reason for allowing the State 15 peremptory challenges in cities of 100,000 inhabitants, while elsewhere the number was fixed at 8. It "is simply providing against the difficulty of securing, in such cases, an impartial jury in cities of that size, which does not exist in other portions of the State."

Thus it will be seen that there must be some reason for these discriminations—some foundation principle of common sense on which the distinction rests. I can see none in the present case. It will hardly be contended by the State that the harsher rule was intentionally applied to the counties in the negro belt, for that would be at once the doom of the statute. Nor can we be allowed to conjecture that the draftsman of the act had this case in view, in which the appeal from the Criminal Court was already pending. There can be no sensible reason suggested for the discrimination; and we say, therefore, it is illegal.

We contend that the procedure, being a matter of gen-

eral law, must be regulated by the same law throughout the State.

Silberman v. Hey (Ohio), 44 L. R. A., 264.

Mr. Webster's definition in the *Dartmouth College Case*, 4 Wheat., 519, so often quoted, is: "By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

See Bank v. Cooper (2 Yerger, 599); 24 Am. Dec., 518, and 543, 544.

Budd v. State, 3 Humph., 490.

Hill v. Town of Sunderland, 3 Vt., 507.

"What is 'the law of the land'? This Court, on two occasions, and upon the most mature consideration, has declared the clause, 'law of the land,' means a general public law, equally binding upon every member of the community. The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, or land, under similar circumstances. * * * The Act of 1827 is peculiarly partial. It is limited in its operation to a comparatively small section of the State, and to a very few individuals claiming a very small portion of the section of country referred to."

Wally's Heirs v. Kennedy, 2 Yerger, 554 (24 Am. Dec., 511).

A law is not general because it operates upon all within a class unless there is a substantial reason why it is made to operate upon that class only and not generally upon all.

Ex parte Jentzsch, 32 L. R. A. (Cal.), 664.

See also, Sutton v. State, 33 L. R. A. (Tenn.), 589.

Point Four.

The plaintiffs in error have been made to be witnesses against themselves, and thus their privileges and immunities as citizens of the United States have been abridged, in violation of the Fourteenth Amendment to the Constitution of the United States.

1. It is perfectly clear from the great decision in *Boyd* v. *United States*, 116 U. S., 616, that the Supreme Court of North Carolina erred when it decided that seizure of a man's private books under a warrant of attachment and their introduction in evidence against him, is not equivalent to making him a witness against himself. In the Boyd case, on information by the District Attorney, in a cause of seizure and forfeiture of property against 35 cases of plate glass, seized by the collector as forfeited to the United States, the charge was that the goods in question were imported into the United States, subject to the payment of duties: and that the owners or agents, committed a fraud on the revenue in evading payment of duties. The plaintiffs in error entered a claim for the goods. By an order of the Court notice was given to claimant's requiring them to produce their invoice. They did so, but objected to its admission into evidence. By the statute a failure to produce, in response to the motion, would have entitled the Government to have the allegations in the motion taken as confessed. This was held a violation of the Fifth Amendment, in compelling the party to be a witness against himself, and, also, of the Fourth Amendment, as an unreasonable search and seizure of his private papers.

The language of the opinion is strikingly pertinent to this case:

"It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within

the scope of the Fourth Amendment to the Constitution, in all cases in which a service and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure." (P. 622.)

"The Act of 1863 was the first act in this country, and, we might say, within this country or in England, so far as we have been able to ascertain, which authorized the search and seizure of a man's private papers, or the compulsory production of them, for the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property." (Pp. 622, 623.)

"In the case of stolen goods the owner from whom they were stolen is entitled to their possession; * * * and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt. * * * Whereas, by the proceeding now under consideration the Court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property." (P. 624.)

Speaking of some of the grievances against which the efforts of John Wilkes were directed, the Court says:

"Prominent among these was the practice of issuing general warrants by the Secretary of State for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel." (Pp. 625, 626.)

The opinion of the Court then largely quotes from Lord Camden's great discussion in *Entick* v. *Carrington and others*, 19 Howell's State Trials, 1029, which it characterizes as one of the permanent monuments of the British Constitution.

"'Papers are the owner's goods and chattels; they are his dearest property; and are so far from endaring a seizure, that they will hardly bear an inspection; and though

the eye can not, by the laws of England, be guilty of a trespass, yet where the private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer these; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.'" (Pp. 627, 628.)

"'I wish some cases had been shown where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has often been tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper search in these to help forward the conviction. * * * It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that search for evidence is disallowed upon the same principle.'" (*Ib.*, 629.)

"And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it can not abide the

pure atmosphere of political liberty and personal freedom." (Pp. 631, 632.)

"Reverting, then, to the peculiar phraseology of this act, and to the information in the present case, which is founded on it, we have to deal with an act which expressly excludes criminal proceedings from its operation (though embracing civil suits for penalties and forfeitures), and with an information not technically a criminal proceeding, and neither, therefore, within the literal terms of the Fifth Amendment to the Constitution any more than it is within the literal terms of the Fourth. Does this relieve the proceedings or the law from being obnoxious to the prohibitions of either? We think not; we think they are within the spirit of both.

"We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and the papers to be used in evidence against him is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms." (P. 632.)

"We are further of opinion that a compulsory production of the private books and papers of the owners of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search

and seizure—within the meaning of the Fourth Amendment." (Pp. 634, 635.)

2. Such being the law, the Fourteenth Amendment protects every citizen of the United States against a violation of this fundamental right of protection and freedom.

Mr. Guthrie, in his recent work on the Fourteenth Amendment (pp. 20–26 and 56–65) discusses the history of the adoption of the Amendment, and the purposes of its framers.

I am indebted to his profound and learned discussion. He calls attention to the fact that the question remains to be settled in the light of the history of the Amendment.

"Doubtless the intention of the Congress which framed and of the States which adopted this Amendment of the Constitution must be sought in the words of the Amendment: and the debates in Congress are not admissible *to control* the meaning of those words. But the statements above quoted are valuable as contemporaneous opinions of jurists and statesmen upon the legal meaning of the words themselves."

United States v. Wong Kim Ark, 169 U. S., 644, 699.

Now it is very manifest that some great purpose underlay the adoption of the peculiar phraseology of the first half of the Fourteenth Amendment. A new sort of citizenship was created—a citizenship under the Constitution and laws of the United States. What rights were intended to be protected under this nomenclature—privileges and immunities of citizens of the United States? The privileges and immunities named in the first eight amendments. If that is not so, the language has almost no meaning—it is mere idle rhetoric.

Judge Cooley in Const. Lim., page 491 (5th ed.), says the precise meaning of the words is not very conclusively settled as yet.

The history of the Amendment throws valuable light upon the meaning of the words. I quote from Mr. Guthrie's book:

"The Fourteenth Amendment was introduced in the United States Senate by Senator Howard, of Michigan, on behalf of the Reconstruction Committee, of which he was a member. This committee consisted of nine members from the House and six from the Senate. They were the real framers of this great constitutional measure. Referring to the provisions of the Constitution as it stood before the adoption of the new amendment and particularly to the Fifth Amendment, Senator Howard said:

'They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress. There is no power given in the Constitution to enforce and carry out any of these guarantees. * * * They stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them, except by their own local Constitutions, which may be altered from year to year. The great object of the first section of this Amendment is, therefore, to restrain the power of the States and to compel them at all times to respect these great fundamental guarantees. * * * The last two clauses of the first section of the Amendment disable a State from depriving not merely a citizen of the United States, but any person, whosoever he may be, of life, liberty or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class

legislation in the States, and does away with the injustice of subjecting one caste of persons to a code not applicable to another. * * * Sec. 1 is a restriction upon the States, and does not, of itself, confer any power upon Congress. * * * I look upon the first section, taken in connection with the fifth, as very important. It will, if adopted by States, forever disable every one of them from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States, and to all persons who may happen to be within their jurisdiction. It establishes equality before the law, and it gives to the humblest, the poorest, the most despised of the race, the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty. * * * Without this principle of equal justice to all men and equal protection under the shield of the law, there is no Republican government and none that is really worth maintaining.'

"In explaining the provision for the equal protection of the laws, Senator Poland said of equality:

'It is the very spirit and inspiration of our system of government, the absolute foundation upon which it was established. It is essentially declared in the Declaration of Independence and in all the provisions of the Constitution. Notwithstanding this, we know that State laws exist, and some of them of very recent enactment, in direct violation of these principles. * * * It certainly seems desirable that no doubt be left existing as to the power of Congress to enforce principles lying at the very foundation of all Republican government if they be denied or violated by the States, and I can not doubt but that every Senator will rejoice in aiding to remove all doubt upon this power of Congress.'

"Thaddeus Stevens, the Republican leader in the House of Representatives, in presenting the proposition for the

Fourteenth Amendment, stated the provisions of the first section, and then said:

'I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are asserted in some form or other in our Declaration or organic laws. But the Constitution limits only the action of Congress, and is not a limitation on the States. This Amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all.'

"Roscoe Conkling was a leading member of the Reconstruction Committee which framed the Amendment. On the argument of the San Mateo County Case in the Supreme Court, December 19, 1882, he produced for the first time the journal of the Committee. This journal has never been published. His argument, which was printed and filed, showed, step by step, how the various provisions came to be inserted, and he affirmed that the Committee intended to give to them the broadest scope and operation, and not in any way to confine their benefit and protection to the colored race. In the course of his argument, Mr. Conkling said:

'At the time the Fourteenth Amendment was ratified, as the records of the two Houses will show, individuals and joint stock companies were appealing for congressional and administrative protection against invidious and discriminating State and local taxes. One instance was that of an express company, whose stock was owned largely by citizens of the State of New York, who came with petitions and appeals seeking acts of Congress to aid them in resisting what they deemed oppressive taxation in two States, and oppressive and ruinous rules of damages applied under State laws. That complaints in respect to property and other rights, made by citizens of Northern

States who took up residences in the South, were rife in and out of Congress none of us can forget; that complaints of oppression, in various forms, of white men in the South—"of Union men"—were heard on every side, I need not remind the Court. The war and its results, the condition of the freedmen, and the manifest duty owed to them, no doubt brought on the occasion for constitutional amendment; but when the occasion came, and men set themselves to the task, the accumulated evils following within the purview of the work were the surrounding circumstances, in the light of which they strove to increase and strengthen the safeguards of the Constitution and the laws.'

"In the same case, Senator Edmunds, who was a member of the Senate when the Fourteenth Amendment was discussed and recommended by that body, speaking of its broad and catholic spirit, said:

'There is no word in it that did not undergo the completest scrutiny. There is no word in it that was not scanned, and intended to mean the full and beneficial thing it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in hand which was not considered.'"

Guthrie on Fourteenth Amendment, page 22, *et seq.*

Said Mr. Justice Field in his dissenting opinion in *O'Neill* v. *Vermont*, 144 U. S., page 363:

"While, therefore, the ten Amendments, as limitations on power, and, so far as they accomplish their purpose and find their fruition in such limitations, are applicable only to the Federal Government and not to the States, yet, so far as they declare or recognize the rights of persons, they are rights belonging to them as citizens of the United States under the Constitution; and the Fourteenth Amendment, as to all such rights, places a limit upon

State power by ordaining that no State shall make or enforce any law which shall abridge them. If I am right in this view, then every citizen of the United States is protected from punishments which are cruel and unusual. It is an immunity which belongs to him, against both State and Federal action. The State can not apply to him, any more than the United States, the torture, the rack or thumbscrew, or any cruel and unusual punishment, or any more than it can deny to him security in his house, papers and effects against unreasonable searches and seizures, or compel him to be a witness against himself in a criminal prosecution. These rights, as those of citizens of the United States, find their recognition and guaranty against Federal action in the Constitution of the United States, and against State action in the Fourteenth Amendment. The inhibition by that Amendment is not the less valuable and effective because of the prior and existing inhibition against such action in the Constitutions of the several States. The Amendment only gives additional security to the rights of the citizen. It was natural that it should forbid the abridgment by any State of privileges and immunities which the Constitution recognized and guaranteed as rights of citizens of the United States. A similar additional guaranty of private rights is found in other instances. An inhibition is contained in the several State Constitutions against their legislatures passing a bill of attainder or an *ex post facto* law, and yet a like inhibition against State action is embodied in the Constitution of the United States."

In the same case (p. 370) Mr. Justice Harlan, whose dissenting opinion was in the main concurred in by Mr. Justice Brewer, said:

"I fully concur with Mr. Justice Field, that since the adoption of the Fourteenth Amendment, no one of the fundamental rights of life, liberty or property, recognized

and guaranteed by the Constitution of the United States, can be denied or abridged by a State in respect to any person within its jurisdiction. These rights are, principally, enumerated in the earlier amendments of the Constitution. They were deemed so vital to the safety and security of the people that the absence from the Constitution, adopted by the Convention of 1787, of express guarantees of them, came very near defeating the acceptance of that instrument by the requisite number of States. The Constitution was ratified in the belief, and only because of the belief, encouraged by its leading advocates, that, immediately upon the organization of the Government of the Union, Articles of Amendment would be submitted to the people, recognizing those essential rights of life, liberty and property which inhered in Anglo-Saxon freedom, and which our ancestors brought with them from the mother country. Among those rights is immunity from cruel and unusual punishments, secured by the Eighth Amendment against Federal action, and by the Fourteenth Amendment against denial or abridgment by the States. A judgment, therefore, of a State Court, even if rendered pursuant to a statute, inflicting or allowing the infliction of a cruel and unusual punishment, is inconsistent with the supreme law of the land."

The majority of the Court declined to pass on the question as not properly raised by the record.

Hodgson v. Vermont, 168 U. S., 262, 268.

To put the point sharply: Suppose the State put a prisoner on the stand and compelled him to give testimony which convicts him of murder; has not one of the fundamental rights of a citizen of the United States been destroyed? Could not this Court protect the citizen? If so, it has the power in this case.

I desire, also, to call attention to the notable argument

of the late John Randolph Tucker in *Spies* v. *Illinois*, 123 U. S., 131, 143, referred to by Mr. Justice Field in his dissenting opinion in *O'Neill* v. *Vermont*, 144 U. S., 359.

This view of the law applies to all the supplemental assignments of error.

Point Six.

The circumstances set forth in the fourth and following assignments of error, amount to a deprivation of liberty without due process of law, and a denial of the equal protection of the laws.

I state this contention with diffidence; but it seems to me that upon sound principles of constitutional liberty, it is not due process of law for a State to permit the private books of its citizens to be seized under process which does not cover them and to be used as evidence to convict of a felony. Nay, more: it is not due process for a State to permit the inmost secrets and details of a man's conscience to be wrung from him by supplemental proceedings, to which he can not object, because the statute has provided [Code of North Carolina sec. 488 (4)] that his examination shall not be used against him in any criminal proceeding or prosecution; and then permit this information to be used to convict him of a crime under the thin disguise that after it was elicited in supplemental proceedings the prosecutor was smart enough to compel its repetition over an objection before a referee; and that only the latter was used. The protection of the statute is a hollow mockery if this can be done.

Counselman v. Hitchcock, 142 U. S., 547.
LaFontaine v. Underwriters, 83 N. C., 142.

This extorting of evidence by the process of the Courts is not and can not be due process. "Due process of law is process due according to the law of the land."

Walker v. Sauvinet, 92 U. S., 90.

No law can be due process which subjects the individual to the arbitrary exercise of the power of government unrestrained by the established principles of private right and distributive justice.

Leeper v. Texas, 139 U. S., 462.

"Due process of law, in each particular case, means such an exertion of the powers of Government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

Cooley Con. Lim., 356.

That this is a proper construction, see remarks of Mr. Justice Harlan, in *Hurtado* v. *California*, 110 U. S., pp. 546, 548, 557.

POINT SEVEN.

But apart from the merits of the discussion, I submit that the questions involved are too important to be disposed of in this summary manner, before the record is printed, without oral argument, with but little time allowed and amid numerous other engagements, to prepare the case for its proper presentation. No man can say that a case presenting to the Court the construction of the first clauses of the Fourteenth Amendment, in the light of its history and the opinions of great judges and lawyers, is either frivolous or meant for delay. The plaintiffs in error invoke the protection of the Constitution for their dearest rights and privileges. It is too big a subject to be dismissed without full argument. I earnestly hope the Court will give the plaintiffs in error a chance to present it with care and deliberation.

I have printed this brief under the idea that, inasmuch

as the defendant in error has not thought proper to wait till the expiration of the time to print the record under Rule 10, sec. 9, it would have the record, or a sufficiency of it printed, to submit this motion. (*Carey* v. *Houston, etc., R. Co.*, 150 U. S., 170.) If this is not done, we respectfully insist that the motion should not be considered.

R. O. BURTON,
For Plaintiffs in Error.

Raleigh, N. C., March 1, 1900.

EDWARDS & BROUGHTON, PRINTERS AND BINDERS, RALEIGH.

For dissenting opinion
see 3 & S. C. Rep. 653

No. 189. IN THE

FILED
OCT 12 1900
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

Oct. of Original Term, 1900.

JOHN P. MALLETT and CHARLES B. MEHEGAN,
Plaintiffs in Error,
vs.
THE STATE OF NORTH CAROLINA,
Defendant in Error.

Filed Oct. 12, 1900. 189

Memorandum of Plaintiffs in Error in Opposition to Motion to Advance Cause.

The statement filed by the defendant in error is defective in that it fails to show the additional assignment of errors filed, page 6 *et seq.* of brief of plaintiffs in error on motion to dismiss or affirm. (See Rule 21; *School District* v. *Hall*, 106 U. S., 428.)

This motion is addressed to the sound discretion of the court. I was informed that the case would be regularly reached in January. So I saw no occasion for hurry in its preparation. Afterwards I had an attack of fever, from the effects of which I have not fully recovered. I hope, therefore, that the case will not be advanced; or, if advanced, that it will be set down for argument late in the year, that I may have time properly to prepare it.

The plaintiffs in error are not in jail; and the little time between this and January, in a case of this nature, can make but little difference to the State.

Respectfully submitted,

R. O. BURTON,
For Plaintiffs in Error.

Raleigh, N. C., Oct. 8, 1900.

No. 189.
Reply Brf. of Busbee & Busbee
Filed April 15, 1901.

Office Supreme Court U.S.
FILED
APR 15 1901
JAMES H. McKENNEY,
Clerk.

No. 189.

IN

The Supreme Court of the United States

OCTOBER TERM, 1900.

JOHN P. MALLETT AND CHARLES B. MEHEGAN,
PLAINTIFFS IN ERROR,

against

THE STATE OF NORTH CAROLINA,
DEFENDANT IN ERROR.

Brief of F. H. BUSBEE, for the Plaintiffs in Error.

POOR COPY

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Brief of F. H. BUSBEE, for the Plaintiffs in Error.

Permission of the Court having been given to file a brief in reply to the brief filed for the defendant in error, without repeating the argument in the printed brief or the oral argument, the appellants will confine themselves to a citation of the pages of the record and of the cases relied upon to sustain their contention.

The sections of the Constitution of the United States which the appellants contend are involved are Article I, section 10: "No State shall enter into any treaty, etc., pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility."

Amendments, Article IV.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures

shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized."

Article V.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Article XIV.

"SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The provisions of the Constitution of North Carolina involved in this appeal will be found in the several sections copied below.

Article I, in Criminal Prosecutions.

"SEC. 11. In all criminal prosecutions, every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defence, and not be compelled to give evidence against himself, or to pay costs, jail fees, or necessary witness fees of the defence, unless found guilty."

Article I, Ex Post Facto Laws.

"SEC. 32. Retrospective laws, punishing acts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty, wherefore no *ex post facto* law ought to be made. No law taxing retrospectively sales, purchases, or other acts previously done ought to be passed."

The statute establishing the Eastern District Criminal Court is found in the Public Acts of 1899, chapter 471. The 6th section of this act reads as follows:

"SEC. 6. That in case an appeal is taken from the judgment of the said Criminal Court for any of the counties aforesaid to the Judge of the Superior Court riding the district, of any question of law or legal inference, and the said Judge shall reverse or modify the decision of the Criminal Court from which the cause was appealed, that the State or the prisoner or prisoners, as the case may be, shall be entitled and allowed to appeal directly to the Supreme Court from the decision of any such Judge as aforesaid, and the appeal to the Supreme Court shall be made up in such manner as appeals are made up as now provided for offences originally tried in the Superior Courts of the State and appealed to the Supreme Court; that in case of appeal from the Criminal Court to the Judge of the Superior Court riding the district, on any question of law or legal inference, and said Judge shall reverse the decision of the Criminal Court, from which such appeal was taken, and no exception was taken to the judgment of the said Judge of the Superior Court, and no appeal is taken to the Supreme Court, the same shall be certified to the Clerk of the Criminal Court, and in case a new trial is granted shall be docketed in the Criminal Court from which appeal was taken, and shall be heard and tried at the next term of the Criminal Court."

By comparison of this act with the act to establish the Western District Criminal Court, Acts of 1899, chapter 371,

it will be seen that the statutes are almost identical, except that section 6 is omitted in the latter act.

The original assignments of error will be found on pages 171, 172 and 173 of the record. As the record is settled by the Court, or by agreement of parties, of course these assignments of error will be taken as made at the proper time on the appeal and before the motion for reargument was submitted. The judgment of the Superior Court on pages 59 and 60, and the case on appeal for the Supreme Court, on pages 60 and 61, are records of even greater force than the assignments of error, since they are records of the Court, rather than a claim of counsel.

These show that the new trial was granted in the Superior Court, for that the facts developed on the examination of the defendants under proceedings supplementary to execution, were, over their objections, used to effect their conviction, both directly in evidence of Dr. Baker and Mr. Henry Gilliam, and indirectly by placing before the jury the evidence of these defendants brought out by the cross-examination before S. S. Nash, referee, in which examination the defendants were asked concerning some matters developed in the said supplementary proceedings.

Extract from Judgment, page 59.

And the assignments of error made by the State in its appeal from the judgment of Judge Hoke, on pages 60 and 61, the finding and conclusion of the Court, that the examination of the defendants was used to secure their conviction, etc.

It is respectfully submitted that where the objection is distinctly made that the defendant is "compelled in any criminal case to be a witness against himself," it follows inevitably that it involves a federal question. By a critical examination of the exceptions which appear by the record to have been taken to the evidence of the various witnesses, involving the defence, that the defendants were being compelled to give evidence

against themselves, will be found at the bottom of page 41, and at the top of page 42 of the record; on page 45, showing that the existence and contents of the book were developed under the proceedings supplemental to execution; on pages 46 and 47, 48 and 50; in the charge of the Court on page 58 it appears that the evidence submitted to the jury by the Judge, upon which the prosecution asked conviction, involved many points which depended solely on the books seized by the sheriff and upon the evidence originally drawn out under the supplementary proceedings, and afterwards extracted from the witnesses when they were examined for the purpose of showing the actual value of the goods set apart to Mallett and Mehegan under the usual proceedings to set apart the personal property exemption. These items are found on pages 57 and 58, Nos. 2, 4, 5, 6, 7 and 10, and depend largely upon the evidence obtained under the special proceeding. The petition of the defendants will appear upon page 65. Under the decisions of North Carolina there can be no rehearing in a criminal case.

State v. Jones, 69 N. C., 16.
State v. Starnes, 94 N. C., 973.

The petition, therefore, was filed before the action of the Supreme Court was final, because, although the opinion had been filed, it had not been certified down to the lower Court. The Court consider the matters alleged in the opinion and reaffirm the original opinion. Page 69. No objection is made by the Judge writing the opinion that the questions upon which the opinion of the Court is asked to be reviewed did not appear in the record. The record contains the examination of the plaintiffs in error under the proceedings supplemental to execution, under The Code of North Carolina, sections 488 to 500 inclusive. The execution in the case of *Baker and Adams, Administrators, v. Mallett and Mehegan,* having been returned unsatisfied, the defendants, Mallett and Mehegan, were forced

to submit to a compulsory examination under section 488, subdivision 1. The proceedings seem to be regular in form, and all objections were overruled.

Subdivision 5, of section 488, of The Code, is as follows: "(5) No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution; nor shall he be excused from answering any question, on the ground that he has, before the examination, executed any conveyance, assignment, or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution."

It has been decided that under this section a witness can not excuse himself from answering by alleging that his answer may be used against him in criminal proceedings.

La Fontaine v. Underwriters, 83 N. C., 132, an extract from which case is quoted in the original brief.

Under the provisions of The Code, sections 501 to 524 inclusive, from the stock of goods levied upon under execution the personal property exemption was set apart to the defendants in the execution (the plaintiffs in error), by appraisers.

Under section 519, of the judgment debtor shall be dissatisfied with the valuation and allotment of the appraisers, he may, upon notice to the adverse party and the sheriff, file exceptions. These exceptions would stand for jury trial, but of course by consent can be referred. The matter was refered to S. S. Nash, and upon the reference, after the plaintiffs in error had testified as to the value of the personal property allotted to them they were examined fully as to the same matters they had been examined upon in the supplementary proceedings. The full record will show the examination of the plaintiffs in error as to the items of personal property exemption.

Under cross-examination the plaintiffs in error were examined fully concerning the matters which had been drawn out of them (while they were under the protection of the law from any subsequent use in criminal proceedings) in the proceedings supplementary to execution, as appears from the cross-examination of J. P. Mallett, on pages 162, 163, and following pages. It appears from that cross-examination that the examination begun before the Clerk of the Superior Court under the supplementary proceedings was used on the cross-examination, and the plaintiffs in error were made to repeat the evidence which had been at first drawn out before the Clerk. Under these facts the plaintiffs in error contend that, so far as the objections based upon the Constitution of the United States, Article I, section 10, are concerned, it appears affirmatively that they could not have been made except in the Supreme Court. Until the State prosecuted its appeal in that Court, under section 6 of the Act of 1899, above cited, no question was presented for adjudication. It was an attempt of the State to prosecute an appeal from the ruling of Judge Hoke in the Superior Court which first raised the question, and the decision of the Supreme Court, sustaining the right of the State to appeal, presents the question fairly before the Supreme Court of the United States. I think it will hardly be contended that this is not squarely presented by the record and upon the distinct ground that the act was unconstitutional, in so far as it applied to trials which took place in the trial Court before the passage of the Act of 1899, because it was *ex post facto*. It also involves with almost equal certainty the contention set up under the 14th amendment, that it deprives the defendants of the equal protection of the law. The plaintiffs in error respectfully insist that this case does not come under that class of cases in which appeal to the federal tribunal is an afterthought, and where the objections set forth in the proceeding in the Court below do not affirmatively appear to have affected the result. It can never appear affirmatively that the

reduction of the number of challenges, or legislation permitting a struck jury, or any of the objections made on pages 3, 4 and 5 of the brief of the defendant in error, actually affected the result; all that could be contended in any of these cases is that it *might* possibly have affected the result. But in the case before the Court it affirmatively appears that by permitting the State to appeal, under the terms of a statute passed after the trial, the result has been reversed and the plaintiffs in error, who were entitled to a new trial under the decision of the Superior Court Judge, have been denied the same upon an appeal. Under this head is also presented the objection to the action, under the 14th amendment, that the plaintiffs in error have been denied the equal protection of the law. Upon the other general branch of exceptions it appears from the record, as quoted above, that the plaintiffs in error expressly objected to the production of their private books, seized under execution, the existence and contents of which had been made to appear by the evidence taken in the supplementary proceedings, after the plaintiffs in error had been examined under the protection afforded by the section concerning supplementary proceedings above quoted.

It is true that the Constitution of the United States was not mentioned by name in the Superior Court, upon the questions involved in the admission of testimony, so far as it appears from the record, though doubtless it was upon the argument. It surely can not be necessary, when the plaintiff sets up the privileges and immunities guaranteed by the Constitution of the United States, that he should file a formal plea that this claim is made under the Federal Constitution.

It is respectfully submitted that no appeal which has reached this Court involved the same question as the present case. While the subject was discussed at length in the Slaughter House cases, there has never been any decision as to what are the "privileges or immunities of citizens of the United States"

There have been a great many decisions as to what are *not* included. The terms do not include the right to be tried by a jury of twelve, nor to be exempt from prosecution unless the indictment is found by a grand jury, etc. As is quoted from Judge Washington, with approval in *Maxwell v. Dow*, 176 U. S., 581: "We feel no hesitation in confining this expression to those privileges and immunities which are in their nature *fundamental*, which belong of right to citizens of free governments, and which have at all times been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign." And in *Cole v. Cunningham*, 133 U. S., 107, it is said that the right to institute actions is among the privileges and immunities which all citizens are entitled to. It seems to the plaintiffs in error that there is no fundamental right pertaining to citizens who inherit as their dearest birthright the privileges and immunites guaranteed by the common law, more sacred than the right not to be liable to give evidence against one's self in a criminal prosecution. While the Court has, upon the one hand, never been swift to search out and proclaim error in the administration of its criminal law by a State, so upon the other hand it has never yet failed to protect the privileges, immunities and liberties of the citizens of the United States, when assailed or endangered.

F. H. BUSBEE,
Council for Plaintiffs in Error.

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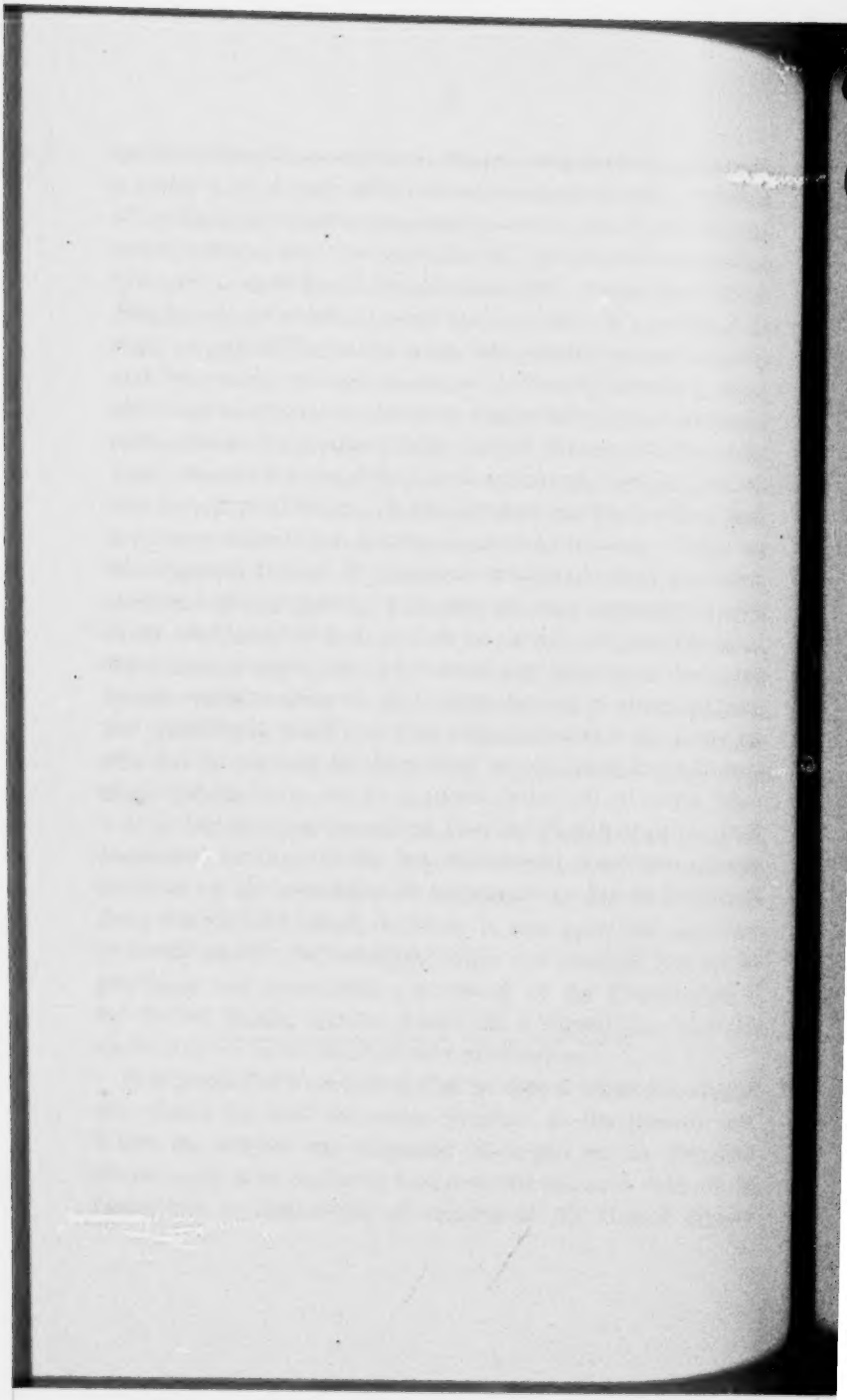

No. 505 1899

Brief of Cook for D. C. C.

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No. 505

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1899.

JOHN P. MALLETT AND C. B. MEHEGAN,
Plaintiffs in Error,
against
THE STATE OF NORTH CAROLINA,
Defendant in Error.

ZEB. V. WALSER, Attorney General for N. C.,
AND
C. A. COOK,
Counsel for Defendant in Error for the purposes of these motions.

No. .....

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1899.

JOHN P. MALLETT AND C. B. MEHEGAN,
Plaintiffs in Error,
against
THE STATE OF NORTH CAROLINA,
Defendant in Error.

And now comes the defendant in error, by its counsel appearing in that behalf, and moves the Court to dismiss the writ of error in the above-entitled cause for want of jurisdiction, because the judgment from which said writ of error purports to have been taken is the judgment of the Supreme Court of one of the United States, to-wit, the Supreme Court of North Carolina.

And the said defendant in error, by counsel as aforesaid, also moves the Court to affirm the said judgment from which said writ of error purports to have been taken, because, although the record in the said cause shows that this Court has jurisdiction in the premises, yet it is manifest that said writ of error was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

ZEB. V. WALSER,
Att'y Gen'l of N. C., and
C. A. COOK,
Counsel for Defendant in Error
for the purposes of these motions.

No. .....

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1899.

To R. O. Burton, Esq., *Counsel for Plaintiffs in Error:*

Please take notice that on Monday, the 12th day of March, 1900, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of the said Court thereon.

Annexed hereto is a copy of the brief of argument to be submitted with said motions in support thereof.

Zeb. V. Walser,
Att'y Gen'l of N. C., and
C. A. Cook,
Counsel for Defendant in Error
for the purposes of these motions.

No.....

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1899.

JOHN P. MALLETT AND C. B. MEHEGAN,
Plaintiffs in Error,
against
THE STATE OF NORTH CAROLINA,
Defendant in Error.

The defendant in error moves the Court to dismiss the writ and affirm the judgment of the Supreme Court of North Carolina.

The following are the facts:

The plaintiffs in error were indicted in the Criminal Court of the county of Edgecombe for conspiracy to defraud, and at the February Term, 1898, thereof, they were tried before his Honor Judge Sutton, and a jury, and were convicted and sentenced to two years imprisonment in the common jail. On April 1, 1899, an appeal was taken from this judgment and certified to the Superior Court of Edgecombe County.

At the time of the commission of the offence, and also at the time of the trial in the Criminal Court of Edgecombe County, the State of North Carolina was not entitled to appeal to the Supreme Court of the State from the judgment of the Superior Court granting defendant a new trial.

At the time of the commission of the offence, and at the time of the trial in the Criminal Court of Edgecombe County, there were two District Criminal Courts in the State of North

Carolina, to-wit, the Eastern District Criminal Court and the Western District Criminal Court. In the Eastern District, in which the county of Edgecombe is situated, the State, since March 6, 1899, is allowed by statute to appeal to the Supreme Court from a judgment of the Superior Court granting a defendant a new trial; whereas, in the Western District the State is not allowed by statute such appeal.

At the June Term, 1899, of the Superior Court of Edgecombe County appeal of the plaintiffs in error was heard and judgment awarding them a new trial was given. From this judgment the State, on July 7, 1899, appealed to the Supreme Court, and at September Term, 1899, thereof, the judgment of the Superior Court of Edgecombe County was overruled, and the judgment of the Criminal Court of Edgecombe County was affirmed

Questions of Law Raised by the Writ of Error.

The plaintiffs in error assign the following errors of law as the foundation for issuing of the writs:

First. That chapter 471, section 6 thereof of the Public Laws of 1899, is *ex post facto* as to the offence charged in the bill of indictment against the plaintiffs in error.

Second. That the plaintiffs in error are denied the equal protection of the law as provided by the Fourteenth Amendment to the Constitution of the United States, because in the Western Criminal District no appeal is allowed the State from the judgment of the Superior Court granting to a defendant a new trial; whereas, in the Eastern Criminal District the State is allowed to appeal from the judgment of the Superior Court, granting a defendant a new trial, to the Supreme Court.

Third. That plaintiffs in error were made witnesses against themselves because their ledger and counter-books had theretofore been seized, under an attachment by the sheriff of

Edgecombe County in a civil action, and were brought into court and introduced as evidence against the plaintiffs in error, notwithstanding their objection thereto.

ARGUMENT.

The defendant in error contends that this Court has no jurisdiction, for that the record does not disclose the fact that any Federal question was raised in the trial of the case in either of the courts in which the case was heard, nor was such question raised. (See opinion by Justice Clark.)

> Dewey v. Des Moines, 173 U. S., 193; and cases there cited.

After the decision was rendered by the Supreme Court of North Carolina, the plaintiffs in error filed an application for re-argument, and therein undertook to raise a Federal question, which had not theretofore been raised, (see application in record), which was in substance and effect a motion for a rehearing, and which was overruled.

And defendant in error contends that such suggestion comes too late.

> Miller v. Cornwall R. R. Co., 168 U. S., p. 131.
> Duncan v. Missouri, 152 U. S., p. 377.

The defendant in error contends that section 6, of chapter 471, of the Laws of 1899, is not *ex post facto* as to the offence charged against the plaintiffs in error.

Ex post facto laws are—

1. Such that make an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action.

2. Which aggravates an offence, or changes the punishment thereof, and makes it greater than it was when it was committed.

3. Which alters the rules of evidence and requires less testimony, or different testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder v. Bull, 3d Dallas, at bottom of p. 390.
Duncan v. Missouri, 152 U. S., 377.

We submit that section 6, of chapter 471, of the Laws of 1899, does not make criminal that which was theretofore innocent and lawful; that it does not change the punishment which attached to the crime of conspiracy to defraud at the time said offence was committed; nor does it change the rules of evidence so as to require less testimony, or different testimony, in order to convict the plaintiffs in error.

Cooley Const. Lim., 5 Ed., p. 327.
Thompson v. Missouri, 171 U. S., 380
Hopt v. Utah, 110 U. S. R., pp. 587, 588, 589 and 590.
12 Am. & Eng. Enclyp., p. 535, and cases there cited, that mode of procedure may be changed.
Kring v. Missouri, 107 U. S., 221.

We submit that the the plaintiffs in error are not denied the equal protection of the laws as provided by the fourteenth amendment to the Constitution of the United States, because the State is allowed to appeal, as hereinbefore stated, in the Eastern District, and is not allowed such appeal in the Western District. That this attitude of the law does not deprive the plaintiffs in error of any right enjoyed by any other citizen of the State, and the plaintiffs in error have all the rights of citizens of the State as conferred by the Constitution and laws thereof. That the fact that the State has not seen proper to grant unto itself the right of appeal in the Western District, as has been allowed in the Eastern District, in nowise

deprives the plaintiffs in error of any rights guaranteed to them by the Constitution and laws of the State, and, therefore, the plaintiffs in error are not deprived the equal protection of the laws.

Guthrie on the Fourteenth Amendment, Chap. IV.
Missouri v. Lewis, 101 U. S., pp. 23, 31, 68; and case cited above.
Hayes v. Missouri, 120 U. S., p. 68.

We submit that the use of the ledger book and counter-book of the plaintiffs in error as evidence against them, was not compelling the plaintiffs in error to become witnesses against themselves. These books constituted "real evidence," and because they had been the personal property of the plaintiffs in error, and had theretofore been seized by the sheriff in a civil action and were in his (the sheriff's) possession at the time of the trial, and were used by the State on the trial, does not render them incompetent. A person who put his foot in a track, stolen goods found in a person's house, may be used as evidence against him.

State v. Graham, 74 N. C. R., at p. 646.
State v. Garrett, 71 N. C., 85.
Walker v. Texas, 7 Tex. App., 245.
Best on Evidence, sec. 183.

This case does not come under the rule laid down in *Boyd* v. *U. S.*, 116 U. S., 616, for there, Boyd's invoice was in his own custody, and, by attachment, forced to produce it in court; while, in this case, the ledger and counter-books of plaintiffs in error had theretofore been seized in a civil action under legal process as *property*, and had been taken from the custody of defendants in error by due process of law. And having thus forfeited their right to the possession and custody thereof, can not complain that the legal owners and custodians thereof offered same in evidence against them.

The prohibition of Article V of the Constitution of the United States "that no person shall be compelled in any criminal case to be a witness against himself," does not apply to the courts of any State, and is only applicable to United States courts.

Barren v. The City of Baltimore, 7th Peters, p. 243.
Fox v. Ohio, 5th Howard, p. 434.
Smith v. The State of Maryland, 18th Howard, p. 76.
Withers v. Buckley and others, 20th Howard, p. 90.
Twitchell v. The Commonwealth, 7th Howard, p. 321.

This last point can not be considered, because the question was not raised in the Criminal Court of Edgecombe County, nor in the Superior Court of that county, as a Federal question, in that it violated Article V of the Constitution of the United States, nor was it passed on by the Supreme Court of North Carolina as a Federal question.

Defendant in error insists, that although the record may show that this Court has jurisdiction, yet, it is manifest the writ of error was taken for delay only, and the question on which the jurisdiction depends is so frivolous as not to need further argument; and, in view of the fact that these questions presented have so frequently been decided by this Court, asks that the motion to affirm be granted.

Whitney v. Cook, 99 U. S., 607.
Hinckley v. Morton, 103 U. S., 764.
Micas v. Williams, 104 U. S., 556.
Swope v. Leffingwell, 105 U. S., p. 3.
Chaunte City v. Trader, 132 U. S., 210.
Kauffman v. Wooters, 138 U. S., 285.
Sugg v. Thornton, 132 U. S., 524.

Counsel for Defendant in Error
for the purposes of these motions.

No. 189.

Mot. of Cook & Harris for D. G. 1900

Filed Sept. 22, 1900.

Office Supreme Court
FILED
1900
JAMES H. McKENNEY,
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

JOHN P. MALLETT and C. B. MEHEGAN, Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA, Defendant in Error.

And now comes the defendant in error, by its counsel appointed in that behalf, and moves the Court, by virtue of section 710 of the Revised Statutes of the United States, and in conformity to Rule Twenty-six, to advance for argument the above-entitled criminal action.

C. A. COOK,
J. C. L. HARRIS,
Counsel for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

JOHN P. MALLETT and C. B. MEHEGAN, Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA, Defendant in Error.

To ROBERT O. BURTON, ESQ.,
Counsel for Plaintiffs in Error:

Please take notice, that on the third Monday of October, 1900, being the [illegible] day of that month, at the opening of the Court, or as soon thereafter as counsel can be heard, the motion of which the foregoing is a copy will be submitted to the Supreme Court of the United States for the decision of said Court thereon.

Annexed hereto is a copy of the statement of the case and the reasons in support of the motion as required by Rule Twenty-six.

C. A. COOK,
J. C. L. HARRIS,
Counsel for Defendant in Error.

Statement of the Case

The plaintiffs in error were indicted in the Criminal Court of the county of Edgecombe for conspiracy to defraud, and at the February Term, 1898, thereof, they were tried before his Honor, *Judge Sutton*, and a jury, and were convicted and sentenced to two years' imprisonment in the common jail. On April 1, 1899, an appeal was taken from this judgment and certified to the Superior Court of Edgecombe County.

At the time of the commission of the offence, and also at the time of the trial in the Criminal Court of Edgecombe County, the State of North Carolina was not entitled to appeal to the Supreme Court of the State from the judgment of the Superior Court granting defendant a new trial.

At the time of the commission of the offence, and at the time of the trial in the Criminal Court of Edgecombe County, there were two District Criminal Courts in the State of North Carolina, to-wit, the Eastern District Criminal Court and the Western District Criminal Court. In the Eastern District, in which the county of Edgecombe is situated, the State, since March 6, 1899, is allowed by statute to appeal to the Supreme Court from a judgment of the Superior Court granting a defendant a new trial. Whereas, in the Western District the State is not allowed by statute such appeal.

At the June Term, 1899, of the Superior Court of Edgecombe County, appeal of the plaintiffs in error was heard and judgment awarding them a new trial was given From this judgment the State, on July 7, 1899, appealed to the Supreme Court, and at September Term, 1899, thereof, the judgment of the Superior Court of Edgecombe County was overruled, and the judgment of the Criminal Court of Edgecombe County was affirmed.

Questions of Law Raised by the Writ of Error.

The plaintiffs in error assign the following errors of law as the foundation for the issuing of the writs:

First. That chapter 471, section 6 thereof, of the Public Laws of 1899, is *ex post facto* as to the offence charged in the bill of indictment against the plaintiffs in error.

Second. That the plaintiffs in error are denied the equal protection of the law as provided by the Fourteenth Amendment to the Constitution of the United States, because in the Western Criminal District no appeal is allowed the State from the judgment of the Superior Court granting to a defendant a new trial; whereas, in the Eastern Criminal District the State is allowed to appeal from the judgment of the Superior Court, granting a defendant a new trial, to the Supreme Court.

Third. That plaintiffs in error were made witnesses against themselves because their ledger and counter books had theretofore been seized, under an attachment by the Sheriff of Edgecombe County, in a civil action, and were brought into Court and introduced as evidence against the plaintiffs in error, notwithstanding their objection thereto.

Reasons for the Motion to Advance.

Because it is a matter of public importance to the State of North Carolina that the criminal law should be enforced as speedily as possible, consistent with the rights of the plaintiffs in error; and because section 710 of the Revised Statutes of the United States appears to be mandatory on the Court and intends that this course shall be pursued whenever a motion to this effect is made by the proper party.

C. A. Cook,
J. C. L. Harris,
Counsel for Defendant in Error.

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J. C. L. Harris & R. O. Green for Def'ts in Error
Filed Mar. 25, 1901.

No. 189.

IN THE SUPREME COURT OF THE UNITED STATES,

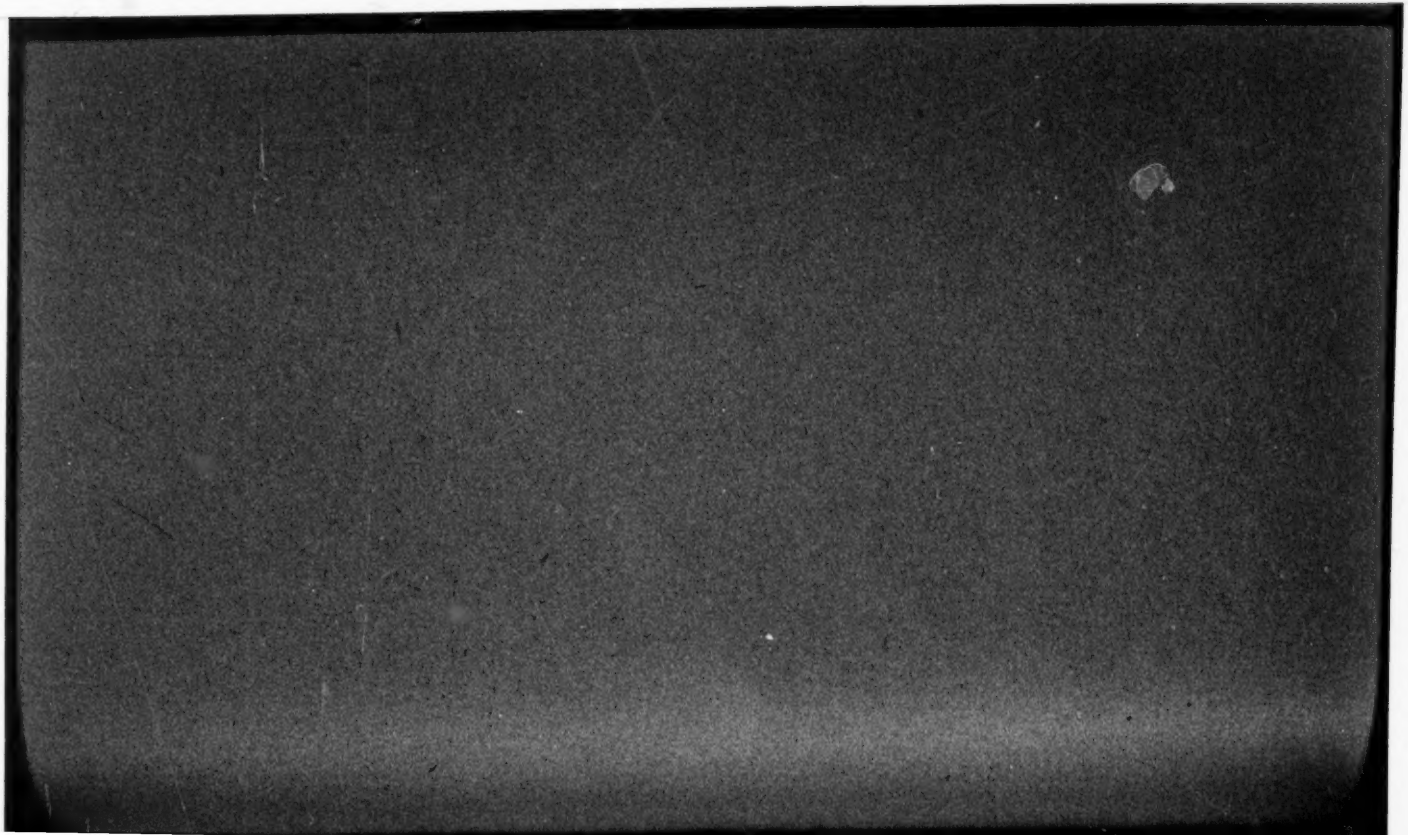
October Term, 1899.

JOHN P. MALLETT AND CHARLES B. MEHEGAN,
Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA.

Brief of J. C. L. HARRIS and R. O. GREEN,
for Defendants in Error.



No. 189.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

NORTH CAROLINA—Edgecombe County.

JOHN P. MALLETT and C. B. MEHEGAN, Plaintiffs in Error,
against
THE STATE OF NORTH CAROLINA.

Brief of J. C. L. HARRIS and B. G. GREEN, for Defendants in Error.

The following are the facts as shown by the record:

The plaintiffs in error were indicted in the Criminal Court of the county of Edgecombe for conspiracy to defraud, and at the February Term, 1898, thereof, they were tried before his Honor Judge Sutton, and a jury, and were convicted and sentenced to two years imprisonment in the common jail. On April 1, 1899, an appeal was taken from this judgment and certified to the Superior Court of Edgecombe County.

At the time of the commission of the offense, and also at the time of the trial in the Criminal Court of Edgecombe County, the State of North Carolina was not entitled to appeal to the Supreme Court of the State from the judgment of the Superior Court granting defendant a new trial.

At the time of the commission of the offense, and at the

time of the trial in the Criminal Court of Edgecombe County, there were two District Criminal Courts in the State of North Carolina, to-wit, the Eastern District Criminal Court and the Western District Criminal Court. In the Eastern District, in which the county of Edgecombe is situated, the State, since March 6, 1899, is allowed by statute to appeal to the Supreme Court from a judgment of the Superior Court granting a defendant a new trial; whereas, in the Western District the State is not allowed by statute such appeal.

At June Term, 1899, of the Superior Court of Edgecombe County, appeal of the plaintiffs in error was heard and judgment awarding them a new trial was given. From this judgment the State, on July 7, 1899, appealed to the Supreme Court, and at September Term, 1899, thereof, the judgment of the Superior Court of Edgecombe County was overruled and the judgment of the Criminal Court of Edgecombe County was affirmed. See *State* v. *Mallett and Mehegan*, 125 N. C. R., at page 718.

QUESTIONS OF LAW RAISED BY THE WRIT OF ERROR.

The plaintiffs in error assign the following errors of law as the foundations for the issuing of the writs:

First. That chapter 471, section 6 thereof, of the Public Laws of 1899, is *ex post facto*, as to the offense charged in the bill of indictment, against the plaintiff in error.

The defendants in error contend that section 6 of chapter 471 of the Laws of 1899, is not *ex post facto* as to the offense charged against the plaintiffs in error:

Ex post facto laws are—

(1) Such that make an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Which aggravates an offense or changes the punishment thereof and makes it greater than it was when it was committed. (3) Which alters the

rules of evidence and requires less testimony, or different testimony, than the law requires at the time of the commission of the offense, in order to convict the offender.

Calder v. Bull, 3d Dallas, at bottom of page 390.

We submit that section 6 of chapter 471 of the Laws of 1899 does not make criminal that which was theretofore innocent and lawful; that it does not change the punishment which attached to the crime of conspiracy to defraud at the time said offense was committed; nor does it change the rules of evidence so as to require less testimony, or different testimony, in order to convict the plaintiffs in error.

Thompson v. Missouri, 171 U. S. Reports, p. 380.

It is well settled that statutes regulating the mode of procedure in the prosecution of antecedent crimes are not *ex post facto*, and that it is in the power of the Legislature to change the form and method of procedure in any manner which, in relation to the offense or its consequences, does not alter the situation of the accused to his disadvantage.

Encyclopædia Law (2d Ed.), vol. 12, page 533.
Hopt v. Utah, 110 U. S., 574.
Duncan v. Missouri, 152 U. S., 377.
Gibson v. Miss., 162 U. S., 566.
Thompson v. Missouri, 171, page 380.

In illustration of above proposition, we cite the following instances in which the form of procedure has been changed by law after the commission of the offenses, in which it was held that such change was not *ex post facto:*

(*a*) Finding of an indictment by grand jury of less than thirteen does not violate "Due process of law":

Talton v. Mayes, 163 U. S., page 376.

(*b*) Law is not *ex post facto* because it changes the manner of summoning and making up the jury as applied to past offenses:

Gibson v. Mississippi, 162 U. S., page 566.
Perry's Case, 3d Gratt (Va.), page 602.

(*c*) The reduction of the number of peremptory challenges allowed the accused, is not *ex post facto:*

South v. State, 86 Alabama, page 617.
State v. Ryan, 13th Minn., page 370.

(*d*) Increasing the number of peremptory challenges allowed the prosecution is not *ex post facto.*

(*e*) Permitting amendment to pending indictment:

Lasure v. State, 19 Ohio St., page 43.
State v. Manning, 14 Tex., page 402.

(*f*) Authorizing the jury to fix the punishment at the trial, which, under the law in force at the time of the commission of the offense, the Court fixed the punishment:

Holt v. State, 2 Tex., page 363.

(*g*) Making the Court the judge of the law, whereas, at the time of the offense, the jury was, is not *ex post facto:*

Marion v. State, 20 Nebraska, page 233.

(*h*) The reduction of the time within which the accused is required to challenge veniremen:

State v. Taylor, 134 Mo., page 109.

(*i*) A retrospective statute regulating the ground for challenge of jurors is not *ex post facto:*

State v. Taylor, 134 Mo., page 109.

(*j*) A statute depriving the counsel for the prisoner of the closing argument is not *ex post facto:*

In People v. Mortimer, 46 Cal., page 114.

(*k*) A statute which abolishes an existing court, or creates a new court, or confers an additional jurisdiction upon an existing court, or diminishes or enlarges the powers of an existing court, is not *ex post facto:*

Duncan v. Mo., 152 U. S., page 377.
Wales v. Belcher, 3 Pick. (Mass.), page 508.
Con v. Philips, 11 Pick. (Mass.), page 28.
State v. Jackson, 105 Mo., page 196.

For a full and complete discussion of *ex post facto* laws, see *The People and Chandler* v. *McDonald*, 5th Wyoming Reports, and as reported in 29th Lawyer's Annotated Reports, at page 834, and cases there cited. Also see

State v. Manning, 14 Texas, at page 402.
Murphy v. Commonwealth, 43 Lawyer's Annotated Reports.

Second. That the plaintiffs in error are denied the equal protection of the law as provided by the Fourteenth Amendment to the Constitution of the United States, because in the Western Criminal District no appeal is allowed the State from the judgment of the Superior Court granting to a defendant a new trial; whereas, in the Eastern Criminal District the State is allowed to appeal from the judgment of the Superior Court granting a defendant a new trial.

We submit that the plaintiffs are not denied the equal protection of the laws as provided by the Fourteenth Amendment to the Constitution of the United States, because the State is allowed to appeal, as hereinbefore stated, in the Eastern District, and is not allowed such appeal in

the Western District. That this attitude of the law does not deprive the plaintiffs in error of any right enjoyed by any other citizen of the State, and the plaintiffs in error have all the rights of citizens of the State as conferred by the Constitution and laws thereof. That the fact that the State has not seen proper to grant unto itself the right of appeal in the Western District, as has been allowed in the Eastern District, in nowise deprives the plaintiffs in error of any rights guaranteed to them by the Constitution and laws of the State, and therefore the plaintiffs in error are not deprived of the equal protection of the laws. *Guthrie on the XIVth Amendment, Chapter IV; Missouri* v. *Lewis, 101 U. S. R., pages 22, 31, 68.*

Special legislation is not obnoxious to the last clause of the Fourteenth Amendment if all persons subject to it are treated alike:

Mo. Pacific R. R. Co. v. Mackey, 127 U. S., 205.
Minneapolis & St. L. R. R. Co. v. Herrick, 127 U. S., 210.
Duncan v. Missouri, 152 U. S., page 377.

Whenever the law operates alike upon all persons and property similarly situated, equal protection can not said to be denied:

Webster v. Nevin, 126 U. S., 578.

The Fourteenth Amendment does not prohibit legislation limited as to the objects or territory, but merely all persons subject to it should be treated alike under like circumstances and conditions:

Hayes v. Missouri, 120 U. S., 68.
Giozza v. Ternan, 148 U. S., 657.
Leeper v. Texas, 139 U. S., page 462.
Missouri v. Lewis, 101 U. S. R., at page 22.

A State is not thereby prohibited from prescribing the jurisdiction of its several courts, either as to territorial limits, or the subject-matter, or amount, or formality of their respective decrees.

Each State has full power to make, for municipal purposes, political subdivisions of its territory, and regulate their local government, including the constitution of the courts, and the extent of its jurisdiction. Each State may establish one system of law in one portion of its territory, and another system in another, provided it does not encroach upon the jurisdiction of the United States nor abridge the privileges and immunities of citizenship of the United States, nor deprive a person of his right without due process of law, nor denies to a person within its jurisdiction the equal protection of the laws in the same district:

Approved, Maxwell v. Dow, 176 U. S., 581.
Boller v. Nebraska, 176 U. S. R., bottom page 88.

Third. That plaintiffs in error were made witnesses against themselves because their ledger and counter books had theretofore been seized, under an attachment by the Sheriff of Edgecombe County in a civil action, and were brought into court and introduced as evidence against the plaintiffs in error, notwithstanding their objection thereto.

We submit that the use of the ledger book and counter book of the plaintiffs in error, as evidence against them, was not compelling the plaintiffs in error to become witnesses against themselves. These books constituted "real evidence," and because they were the personal property of the plaintiffs in error, and had theretofore been seized by the sheriff in a civil action and were in his possession at the time of the trial, and were used by the State on the trial, does not render them incompetent. A person may be compelled to put his foot in a track; stolen goods found in a person's house may be used as evidence against him.

The following opinion in the *State* v. *Graham*, to be found in 74 N. C. R., at page 646, is full and complete on this question:

RODMAN, J. The first exception is, because the Judge permitted the officer who had the prisoner in custody to testify, that he made the prisoner put his foot in the tracks found in the prosecutor's field, and that his foot fitted the tracks perfectly. It is argued that making the prisoner put his foot in the track was procuring evidence by duress, and the case of *State* v. *Jacobs*, 5 Jones, 259, is cited.

The object of all evidence is to elicit the truth. Confessions which are not voluntary, but are made either under the fear of punishment if they are not made, or in the hope of escaping punishment if they are made, are not received as evidence, because experience shows that they are liable to be influenced by those motives, and cannot be relied on as guides to the truth. But this objection will not apply to evidence of the sort before us. No fears or hopes of the prisoner could produce the resemblance of his track to that found in the corn field. This resemblance was a fact calculated to aid the jury and fit for their consideration.

Evidence of this sort is called by the civilians "real evidence," is always admissible and is of greater or less value according to the circumstances. In Best on Evidence, sec. 183, the following instances of its value are given: "In a case of burglary, where the thief gained admittance into the house by opening the window with a pen-knife, which was broken in the attempt, and a part of the blade left sticking in the window-frame, a broken knife, the fragment of which corresponded with that in the frame, was found in the pocket of the prisoner. So where a man was found killed by a pistol, the wadding in the wound

consisted of a part of a printed paper, the corresponding part of which was found in the pocket of the prisoner. In another case of murder, a patch on one knee of the prisoner's breeches corresponded with an impression found on the soil, close to the place where the murdered body lay. In a case of robbery, the prosecutor when attacked struck the robber on the face with a key, and a mark of a key with corresponding wards was visible on the face of the prisoner," etc. Similar instances might be cited indefinitely. The exception, however, is that the officer made the prisoner put his foot in the track in order to test the resemblance It has been seen that this could not alter the fact of the resemblance, which is the only matter that would have weight as evidence. It has been often held, that if a person under duress confesses to having stolen goods and deposited them in a certain place, although his confession of the theft will be rejected, yet evidence that he stated where the goods were, will be received, provided the goods were found at the place described *Reg.* v. *Gould*, 9 C. & P., 364; *Duffy* v. *People*, 25 N. Y., 588; *White* v. *State*, 3 Heisk., 338; *Selidge* v. *State*, 30 Tex , 60.

The facts of the goods being found in the place described proves that he knew they were there, and this knowledge is a fact bearing on the question of his guilt, to which the jury is entitled. An officer who arrests a prisoner has a right to take any property which he has about him, which is connected with the crime charged, or which may be required as evidence. Roscoe Cr. Ev., 211; *R.* v *O'Donnell*, 7 C. & B., 138 (32 E. C. L. R.); *R.* v. *Kinsey*, Id., 447; *R.* v. *Burgess*, Id., 488; *R.* v. *Rooney*, Id., 515

If an officer who arrests one charged with an offence, had no right to make the prisoner show the contents of his pocket, how could the broken knife, or the fragment

of paper corresponding with the wadding, have been found? If when a prisoner is arrested for passing counterfeit money, the contents of his pockets are sacred from search, how can it ever appear whether or not he has on his person a large number of similar bills, which, if proved, is certainly evidence of the *scienter?* If an officer sees a pistol projecting from the pocket of a prisoner arrested for a fresh murder, may he not take out the pistol against the prisoner's consent, to see whether it appears to have been recently discharged? Suppose it be a question as to the identity of the prisoner, whether a person whom a witness says he saw commit a murder, and the prisoner appears in court with a veil or a mask over his face: May not the Court order its removal in order that the witness may say whether or not he was the person whom he saw commit the crime?

Would the robber whose face was marked with the wards of a key have been allowed to conceal his identity by wearing a mask during the trial?

We conceive that these questions admit of but one answer, and that is one consistent with the general practice.

We concur with the Judge below, that the officer had a right to take off the boots or shoes of the prisoner and compare them with the tracks in the corn field. And we also agree with him in the opinion that when the prisoner, upon being required by the officer to put his foot in the track, did so, the officer might properly testify as to the result of the comparison thus made. It is unnecessary to say whether or not the officer might have compelled the prisoner to put his foot in the tracks if he had persisted in refusing to do so. The refusal and the result of the comparison made by the officer between the track and the prisoner's shoe would have been competent.

There is no error. Judgment affirmed. Let this opinion be certified.

Per Curiam. Judgment affirmed.

The prohibition of Article V of the Constitution of the United States, "that no person shall be compelled in any criminal case to be a witness against himself," does not apply to the courts of any State, and is only applicable to United States Courts:

Barron v. The City of Baltimore, 7th Peters, page 243.

Fox v. Ohio, 5th Howard, page 434.

Smith v. The State of Maryland, 18th Howard, page 76.

Withers v. Buckley and others, 20th Howard, page 90.

Twitchell v. The Commonwealth, 7th Wallace, page 321.

This last point cannot be considered because the question was not raised in the Criminal Court of Edgecombe County, nor in the Superior Court of that county, as a Federal question, in that it violated the Fifth Article of the Constitution of the United States, nor was it passed on by the Supreme Court of North Carolina as a Federal question.

This Court has repeatedly held that the first eight amendments to the Constitution applied to only the Federal Courts. "And we have repeatedly held the Fourteenth Amendment was not intended to curtail the powers of the State to so amend their laws as to make them conform to the wishes of their citizens, to changed views of administration, or to the exigencies of their social life."

Maxwell v. Dow, 176, U. S. R., page 581.

The privileges and immunities of a citizen of the United States does not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government.

The first ten amendments contain no restriction upon the States, but were intended to operate solely upon the Federal Government.

Brown v. New Jersey, 175 U. S., page 174.

J. C. L. HARRIS,
B. G. GREEN,
Counsel for Defendants in Error.

No. 189.

Motion to reassign.

No. 189

Filed Dec. 28, 1900.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

JOHN P. MALLETT AND C. B. MEHEGAN,
Plaintiffs in Error,

against

THE STATE OF NORTH CAROLINA,
Defendant in Error.

Motion to Assign a Later Day for Argument.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The plaintiffs in error, John P. Mallett and C. B. Mehegan, respectfully represent that on motion of the defendant in error this cause has been advanced and set down for argument on January 7th, 1901; that during the autumn just passed, counsel for plaintiffs in error, Robert O. Burton, Esquire, was ill with typhoid fever, but he confidently expected to be able to prepare the case for argument by the date assigned, January 7th, 1901. Your petitioners further represent that Mr. Burton is their sole counsel, and that he is the only person cognizant of the facts of their case and the law applicable thereto; that he has given special consideration to the case ever since it was taken by appeal to the Supreme Court of North Carolina. That owing to his long illness from typhoid fever in the autumn he has been unable to prepare a brief, as he expected to do. That attempting to resume work some weeks

ago, he was again stricken with fever, and is now prostrate in bed with a low, continued fever. That he is under positive instructions from his physician that when he shall become convalescent, he shall undertake no work for weeks, until he shall have had an opportunity to regain his strength at some health resort.

Your petitioners are unable to procure other counsel, and even if they could do so, time would not permit the preparation of a satisfactory brief in their case, which, as they are advised, involves the consideration of divers sections of the Constitution of the United States, and interesting and important questions relating thereto. The liberty of plaintiffs in error is at stake.

They respectfully ask that the case may be assigned for some day later in the term in order that they may have the benefit of their counsel's labor and attendance. Their counsel's preference is for some day early in the month of April.

Respectfully submitted,

JOHN MALLETT,
C. B. MEHEGAN,
Plaintiffs in Error.

Notice of the motion to reassign this case accepted by defendant in error, to be heard January 7th, 1901.

Supreme Court of the United States.

No. 189.—October Term, 1900.

John P. Mallett and C. B. Mehegan, Plaintiffs in Error, vs. The State of North Carolina. } In error to the Supreme Court of North Carolina.

[May 20, 1901.]

In September, 1898, John P. Mallett and Charles B. Mehegan were indicted and tried in the criminal court of the county of Edgecombe, North Carolina, for conspiracy to defraud. They were convicted and sentenced to two years' imprisonment in the common jail. They appealed to the Superior Court. The record was certified up by the clerk of the criminal court on April 1, 1899. The Superior Court reversed the verdict and judgment, and granted a new trial. From this judgment of the Superior Court the State appealed, on July 7, 1899, to the Supreme Court, which reversed the judgment of the Superior Court, and remanded the cause to the criminal court, with directions that the sentence imposed by that court should be carried into execution.

At the time of the commission of the offense, and at the time of the trial in the criminal court of Edgecombe County, the State of North Carolina was not entitled to appeal to the Supreme Court of the State from the judgment of the Superior Court granting the defendants a new trial. There are two district criminal courts in the State—the Eastern and the Western. In the eastern district, in which the county of Edgecombe is situated, the State, since March 6, 1899, by legislation of that date, is allowed to appeal to the Supreme Court from a judgment of the Superior Court granting a defendant a new trial, but such right of appeal is not allowed to the State from judgments of the Superior Court in cases on appeal from the western district criminal court. It thus appears that the right of appeal from the Superior Court to the Supreme Court was conferred upon the State after the commission of the offense and the trial in the criminal and before the Superior Court had granted a new trial.

From the judgment of the Supreme Court of the State a writ of error was allowed to this court.

Mr. Justice Shiras delivered the opinion of the Court.

Before considering the errors assigned by the plaintiffs in error to the judgment of the Supreme Court of North Carolina, it is proper that we should dispose of the motion made by the counsel for the State to dismiss

the writ of error, on the alleged ground that the record does not disclose that any Federal question was raised in either of the courts in which the case was heard, and that no such question was raised.

It is, of course, obvious that there was no opportunity for the defense to raise in the criminal court the question as to the validity, as against the defendants, of the legislation allowing an appeal to the Supreme Court, because that legislation was not enacted till after the trial had been concluded.

It would also seem that the question of the validity of that legislation, in its Federal aspect, was not raised or considered in the Superior Court. It is true that in that court error was alleged to the action of the criminal court in permitting evidence of certain statements in the books of the defendants, and which books had been seized by the sheriff under an attachment against the property of the defendants, to be used on the trial against the defendants and over their objection, and that contention was sustained by the Superior Court, and the new trial was granted for that and other reasons. But it does not appear that the Superior Court was formally called upon to consider any Federal question.

But we are of opinion that questions arising under the Constitution and laws of the United States were presented in the Supreme Court of the State, and were by that court considered and decided against the party invoking their protection.

It is true, as we learn from the first opinion filed by the Supreme Court, that such Federal questions were not considered by that court, or, at all events, were not treated as Federal questions, but as questions arising under State laws. But the record discloses that, after that opinion had been filed but before it had been certified down, the defendants filed a petition for reargument, and presented the Federal questions on which they rely. The Supreme Court entertained the petition, and proceeded to discuss and decide the Federal questions. In support of the motion to dismiss numerous decisions of this court are cited to the effect that it is too late to raise a Federal question by a petition for a rehearing in the Supreme Court of a State after that court has pronounced its final decision. (*Loeber* v. *Schroeder*, 149 U. S. 580; *Sayward* v. *Denny*, 158 U. S. 183; *Pim* v. *St. Louis*, 165 U. S. 273.)

But those were cases in which the Supreme Court of the State refused the petition for a rehearing, and dismissed the petition without passing upon the Federal questions. In the present case, as already stated, the Supreme Court of North Carolina did not refuse to consider the Federal questions raised in the petition, but disposed of them in an opinion found in this record. (*State* v. *Mallett*,, 125 N. C. R. 718.) Had that court declined to pass upon the Federal questions and dismissed the petition without considering them, we certainly would not undertake to revise their action.

The first contention we encounter in the assignments of error is that, as the statute which provides for an appeal from the Superior Court to the Supreme Court in criminal cases was not passed until after the commission of the offense charged and the trial in the Criminal Court, it was, as against the plaintiffs in error, *ex post facto* and in violation of Art. 1, sec. 10, of the Constitution of the United States.

The opinion of the Supreme Court stating the facts and disposing of this question is brief, and may be properly quoted:

"The next exception in the petition is that at the time of the offense the statute allowed no appeal to the State from the ruling of the Superior Court judge. But the defendant had no 'vested rights' in the remedies and methods of procedure in trial for crime. They cannot be said to have committed the crime relying upon the fact that there was no appeal given the State in such cases. If they had considered that matter they must have known that the State had as much power to amend section 1237 as it had to pass it, and they committed the crime subject to the probability that appeals in rulings upon matters of law would be given the State from these intermediate courts. At any rate, their complaint is of errors in the trial court, and when they appealed to the Superior Court they did so by virtue of an act which provided that the rulings of that court upon their case could be reviewed, at the instance of the State, in a still higher court. The appeal was certified up to the Superior Court April 1, 1899, and on July 7, 1899, the appeal was taken to this court. The statute regulating appeals from the Eastern District Criminal Court, chapter 471, Laws 1899, was ratified March 6, 1899."

The subject has been several times considered by this court. The first case was that of *Calder* v. *Bull*, (3 Dall. 386,) where the important decision was made that the provision prohibiting *ex post facto* laws had no application to legislation concerning civil rights. But the opinion, delivered by Mr. Justice Chase, contains a classification of the criminal cases in which the provision is applicable:

"1st. Every law makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates the crime or makes it greater than it was when committed. 3d. Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender."

In *Cummings* v. *State of Missouri* and *Ex parte Garland*, (4 Wall. 277, 333,) a law which excluded a minister of the gospel from the exercise of his clerical functions, and a lawyer from practice in the courts, unless each would take an oath that they had not engaged in or encouraged armed hostilities against the government of the United States, was held to be an *ex post facto* law, because it punished, in a manner not before prescribed by law, offenses committed before its passage, and because it instituted a new rule of evidence in aid of conviction.

In *Kring* v. *Missouri*, (107 U. S. 221,) will be found an elaborate review of the history of the *ex post facto* clause of the Constitution and of its construction by the Federal and the State courts. Kring was convicted of murder in the first degree, and the judgment of condemnation was affirmed by the Supreme Court of Missouri. A previous sentence pronounced on his plea of murder in the second degree and subjecting him to an imprisonment for twenty-five years had, on his appeal, been reversed and set aside. By the law of Missouri in force when the homicide was committed this sentence was an acquittal of the crime of murder in the first degree; but before his plea of guilty was entered the law was changed; so that by by the force of its provisions, if a judgment on that plea be lawfully set aside, it shall not be held to be an acquittal of the higher crime; and it was held, four of the justices dissenting, that, as to this case, the new law was an *ex post facto* law, and that he could not again be tried for murder in the first degree.

In *Hopt* v. *Utah*, (110 U. S. 574, 587,) one of the questions presented was, whether a law which made it competent for witnesses to testify to the commission of a crime who were incompetent to so testify at the time the crime was so committed, was an *ex post facto* law, and it was unanimously held otherwise. *Kring* v. *Missouri* was cited and relied on by the plaintiff in error, and was disposed of by the court, per Mr. Justice Harlan, in the following observations:

"That decision proceeded upon the ground that the State constitution deprived the accused of a substantial right which the law gave him when the offense was committed, and, therefore, in its application to that offense and its consequences altered the situation of the party to his disadvantage. By the law as established when the offense was committed, Kring could not have been punished with death after his conviction of murder in the second degree, whereas by the abrogation of that law by the constitutional provision subsequently adopted, he could thereafter be tried and convicted of murder in the first degree. Thus the judgment of conviction of murder in the second degree was deprived of all force as evidence to establish his absolute immunity thereafter from punishment for murder in the first degree. This was held to be the deprivation of a substantial right which the accused had at the time the alleged offense was committed.

"But there are no such features in the case before us. Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not *ex post facto* in their application to prosecutions for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done; nor aggravate any crime theretofore committed; nor provide a greater punishment therefor than was prescribed at the time of its commission; nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed. The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory

alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, ought, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment nor change the ingredients of the offense, or the ultimate facts necessary to establish guilt, but, leaving untouched the nature of the crime and the amount or degree of proof essential to conviction, only remove existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the State, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged."

In *Gibson* v. *Mississippi*, (162 U. S. 565,) it was held that the Mississippi Code, in force when the indictment was found, did not affect in any degree the substantial rights of those who had committed crime prior to its going into effect; it did not make criminal and punishable any act that was innocent when committed, nor aggravate any crime previously committed, nor inflict a greater punishment than the law annexed to such crime at the time of its commission, nor alter the legal rules of evidence in order to convict the offender. That the inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed. That the mode of trial is always under legislative control, subject only to the condition that the legislature may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against *ex post facto* enactments.

In *Thompson* v. *Missouri*, (171 U. S. 380,) it was held that an act of the legislature of Missouri, providing that comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute, is not *ex post facto*, under the Constitution of the United States, when applied to prosecutions for crimes committed prior to its passage. In the opinion in this case the previous decisions were again reviewed, and the following passage from Cooley's Treatise on Constitutional Limitations was quoted with approval:

"So far as mere modes of procedure are concerned a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The legislature

may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, although it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." (Chap. 9, p. 272, 5th ed.) See likewise *Duncan* v. *Missouri*, (152 U. S. 377.)

Applying the principles established by these cases to the facts of the present case, we think it may be concluded that the legislation of North Carolina in question did not make that a criminal act which was innocent when done; did not aggravate an offense or change the punishment and make it greater than when it was committed; did not alter the rules of evidence, and require less or different evidence than the law required at the time of the commission of the offense; and did not deprive the accused of any substantial right or immunity possessed by them at the time of the commission of the offense charged.

It must not be overlooked that, when the plaintiffs in error perfected their appeal from the Criminal Court, by procuring its certification, on April 1, 1899, to the Superior Court, the new law, ratified on March 6, 1899, provided that the State could have the decision of that court reviewed by the Supreme Court.

Upon the whole, therefore, we agree with the Supreme Court of North Carolina in holding that the law granting the right of appeal to the State from the Superior to the Supreme Court of the State was not an *ex post facto* law within the meaning of the Constitution of the United States.

The further contention, that the plaintiffs in error were denied the equal protection of the laws because the State was allowed an appeal from the Superior Court of the eastern, and not from the western, district of the State, is not well founded.

In *Missouri* v. *Lewis*, (101 U. S. 23,) it was held that, by the Fourteenth Amendment of the Constitution of the United States, a State is not prohibited from prescribing the jurisdiction of the several courts, either as to their territorial limits, or the subject-matter, amount or finality of their respective judgments or decrees; and that where, by the constitution and laws of Missouri, the St. Louis Court of Appeals has exclusive jurisdiction in certain cases of all appeals from the circuit courts in St. Louis and some adjoining counties, and the Supreme Court has jurisdiction of appeals in like cases from the circuit courts of the remaining counties of the State, such an adjustment of appellate jurisdiction is not forbidden by anything contained in the Fourteenth Amendment. It was said by Mr. Justice Bradley, giving the opinion of the court:

"Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory

and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the amendments thereto. . . . If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of the line there may be a right of trial by jury, and on the other no such right. Each State prescribes its own modes of judicial proceedings. If diversities of laws and of judicial proceedings may exist in the several States without violating the equality clause of the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision."

The principles of this case have been approved and applied in several subsequent cases. (*Hallinger* v. *Davis*, 146 U. S. 314, 322; *Hodgson* v. *Vermont*, 168 U. S. 272; *Holden* v. *Hardy*, 169 U. S. 384; *Brown* v. *New Jersey*, 175 U. S. 172.)

We, therefore, see no error in the action of the Supreme Court of North Carolina in holding that the State has control of its own legislation as to the cases in which it will permit appeals in its own behalf in its courts.

There remains to consider the contention that, in the trial in the criminal court, by the use of certain books of account belonging to them, the plaintiffs in error were thereby made to be witnesses against themselves, and thus their privileges and immunities as citizens of the United States have been abridged, and they are deprived of their liberty without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.

In the petition for a rehearing in the Supreme Court, which, as we have seen, is the only part of the record on which the plaintiffs in error can rely as raising Federal questions, the point was thus presented:

"That prior to the beginning of this action an attachment against the property of the defendant was issued at the instance of J. M. Baker, administrator of M. L. Woolard and of Solomon Woolard, who is the chief prosecuting witness in this case. By virtue of said attachment the sheriff of Edgecombe County seized the ledger and counter book of the defendants and has kept possession of them up to this time. At the trial of the present indictment the said books so wrongfully taken from the defendants were offered in evidence. The defendants objected; the objec-

tion was overruled, and the defendants excepted. In this the defendants submit there was error. For it is, in effect, making the defendants give evidence against themselves under the principles laid down in the case of *Boyd* v. *United States*, (116 U. S. 616.) At the argument of this case at this term counsel had not found this authority, and their argument did not go upon this ground. Since said hearing they found said case, and they are advised that the principle and the authority are decisive, and would at once satisfy the court of the defendants' right to a new trial, if the matter could be brought to its attention."

The only ground of objection shown by the record to have been taken by defendants' counsel to the admission of this evidence was "because the testimony now offered was subsequent to the examination in the supplementary proceedings."

Nothing seems to have been claimed, either in the criminal court or in the Superior Court, as to the inadmissibility of the books as evidence on the ground of any provision of the Federal Constitution. The Supreme Court thus treated the subject:

"We will consider now the only exception which the petition to reargue insists the judge of the Superior Court should have passed upon in his favor, *i. e.*, that the sheriff, by attachment, having seized the ledger and counter book of the defendants, they were put in evidence against them. There was certainly no error in using the defendants' own entries against them. The shoes of a party charged with crime can be taken and fitted to tracks as evidence, and in one case, when a party charged with crime was made to put his foot into the tracks, the fact that it fitted was held competent. (*State* v. *Graham*, 74 N. C. 648.) Nor has it ever been suspected that if, upon a search warrant, stolen goods are found in the possession of the prisoner, that fact cannot be used against him. Here the books came legally into the possession of another, and the telltale entries were competent against the parties making them in the course of their business."

It therefore appears by the statement of the plaintiffs in error in their petition for a reargument that no Federal question was raised or considered in the Criminal Court or in the Superior Court, in respect to the admission of the evidence. So that there was no basis on which to claim error in this respect in those courts. Nor did the Supreme Court, in passing upon the contention, deal with it as a Federal question, but as a mere question arising under the administration of the criminal law of the State, and there is, therefore, nothing in its action for us to review.

But we do not wish to be understood as implying that, even if this question had been duly presented in the State courts as a Federal question, there was error in admitting the evidence complained of.

The judgment of the Supreme Court of North Carolina is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.